No. 00-337 JUN 21 2000

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In the

**Supreme Court of the United States**

LEO HISE and JACK ISCH, individually and as representatives of a class of others similarly situated,

*Petitioners,*

versus

**PHILLIP MORRIS INCORPORATED** (a Virginia Corporation), **R. J. REYNOLDS TOBACCO COMPANY** (a New Jersey Corporation), **BROWN & WILLIAMSON TOBACCO CORPORATION,** (a Delaware Corporation), **LORRILARD TOBACCO COMPANY** (a Delaware Corporation), and **THE LIGGETT GROUP D/B/A LIGGETT AND MYERS TOBACCO COMPANY** (a Delaware Corporation),

*Respondents.*

**On Petition for a Writ of Certiorari To The United States Court of Appeals for the Tenth Circuit**

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Do the actions of the various state attorneys general, in entering into a multistate agreement with major interests controlling most of private industry, constitute "state action", entitling those interests to a judicial exception to the antitrust laws, and may prices thereby be controlled and taxes levied upon the citizens of other states? If so, is Article I, Sec. 10 of the Constitution of the United States, requiring the consent of Congress, applicable?

Should the "Indirect Purchaser Rule" bar the opportunity of "targeted"consumers to seek relief under the antitrust laws of the United States?

Should a "Settlement Agreement" entered into with state officers clearly acting outside the scope of their authority be protected under the guise of the "right to petition" to influence "state action" under the antitrust laws of the United States?

How early in a lawsuit may the District Courts utilize the summary judgement standards for shifting of the burden of proof to plaintiffs as set forth in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) to dispose of litigation upon their dockets? In so doing are the District Courts bound by their own local rules? May the District Courts thereby require a greater burden of proof upon the nonmovng party?

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## PETITION FOR WRIT OF CERTIORARI

Petitioners, Leo Hise and Jack Isch, respectfully pray that a writ of certiorari issue to review the Judgement and Opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on February 17, 2000.

## OPINIONS BELOW

The April 30, 1999 Order of the United States District Court for the Northern District of Oklahoma (Case No. 98CV947 C), 46 F.Supp. 1201 (N.D.Okla. 1999), granting Summary Judgement against Petitioners, was affirmed by the United States Court of Appeals for the Tenth Circuit (Case No. 98-5113) in it's original Order and Judgement and Order denying Rehearing dated February 17, 2000 and March 23, 2000, respectively.

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## GROUNDS FOR JURISDICTION OF THIS COURT

This Petition for Writ of Certiorari seeks review of the Opinion and Opinion upon Rehearing of the United States Court of Appeals for the Tenth Circuit dated February 17 , 2000 and March 23, 2000, respectively. Jurisdiction in this Court is conferred by 28 U.S.C. Sec. 1254.

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## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THE CASE

Constitution of the United States, Article I, Sec. 10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Constitution of the United States, Article IV, Section 4

The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive

(when the legislature cannot be convened) against domestic violence.

15 U.S.C. Sec. 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. Sec. 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Federal Rules of Civil Procedure, Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

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Federal Rules of Civil Procedure, Rule 56, Summary Judgement.

[App. 38]

U.S. District Court Rules Northern District Of Oklahoma, Local Rule 56.1, Summary Judgement Motions

A. Material Fact Statement. A brief in support of a motion for summary judgement (or partial summary judgement) shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be numbered and shall refer with particularity to those portions of the record before the court upon which movant relies.

B. Response Brief. The response brief to a motion for summary judgement (or partial summary judgement) shall begin with a section which contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of the movant's fact that is disputed. All material

facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party.

C. Reply Briefs to Address New Matter. Reply briefs may be filed pursuant to L.R. 7.1(D) in connection with summary judgement motions only if they address new matter.

D. Record. The record on summary judgement shall consist of all materials permitted by Rule 56 of the Federal Rules of Civil Procedure that are properly in the record before the court.

E. Accelerated Scheduling. Within the court's discretion, an accelerated briefing schedule and further brief page limitations may be imposed in connection with full or partial motions for summary judgement.

F. Disposition by Magistrate Judge. In order to avoid duplication of effort, the court will not ordinarily refer motions for summary judgement to a magistrate judge for report and recommendation. However, motions for summary judgement may be referred upon consent to the assigned magistrate judge for final decision under the partial consent procedure provided pursuant to 28 U.S.C. § 636(c), Rule 73 of the Federal Rules of Civil Procedure, and Local Rule 73.1(A)(3).

## STATEMENT OF THE CASE

This Petition for Writ of Certiorari should be granted for compelling reasons affecting the very fiber of our republican form of government guaranteed to citizens of each of the states. If not addressed by this Court, the precedent established by the "Tobacco Settlement Agreement" will continue to erode the influence and power of the legislative branch of government by allowing select political activists to effectuate public policy through subterfuge litigation, instead of through the appropriate legislative bodies. Whether it be in matters of tobacco policy, gun policy, transportation safety, food safety, personal choice or environmental matters, a blueprint is established by this agreement. The duly elected legislative bodies must be the forum to establish appropriate policy upon matters of public concern. National public policy must not be established through negotiated back room deals between only the most powerful entities within an industry and a select group of state administrative officials, based only upon expediency, profit and frustration with the legislative process. Likewise, those citizens directly damaged by such an alliance should have access to the judicial system to restrain the damage unlawfully inflicted upon them, and to seek restitution therefor.

This Court, in the case of *Cipollone v. Liggett Group*, 505 U.S. 504(1992) dispelled the belief that the 1965 Federal Cigarette Labeling and Advertising Act and the Public Health Cigarette Smoking Act of

1969 shielded tobacco companies from suits concerning the health effects of smoking. Although certain claims such as some failure to warn theories and causes based upon advertising and promotional statements tending to minimize smoking's health hazards may be preempted, causes of action such as breach of express warranties, intentional fraud (both by false representation and concealment of material facts and conspiracy to misrepresent or conceal material facts concerning smoking's health hazards) do not appear to be preempted.

Following this Court's opinion in *Cipollone v. Liggett Group*, supra., Congressional hearings were initiated and it was publically disclosed that certain specific tobacco companies had suppressed results of scientific studies and perpetrated fraudulent and misleading impressions to the public. Subsequently, a number of States, alleging that certain tobacco companies hid knowledge of the addictive and deleterious effects of smoking, initiated litigation purportedly to recoup health care costs, believed to be associated with smoking, which they had provided to their respective citizens.

On June 20, 1997, certain state attorneys general, representatives of the public health community, private plaintiffs' lawyers and major representatives of the tobacco industry reached a consensus on a proposal for legislation, the first "settlement agreement", which was in most respects identical to the subject "Settlement Agreement". The proposed legislation was designed to settle litigation against tobacco companies; address public health concerns,

particularly regarding youth access to, and usage of, tobacco products; permit the tobacco companies to operate in a more stable and predictable environment; and preserve the rights of adults who choose to use tobacco products. Congress sought to amend that proposed resolution by creating a new bill (S 1415, 105th Congress). The major companies of the tobacco industry found the resulting bill to be onerous and withdrew their support, opting to preempt Congressional action through negotiations with the various state attorneys general. As a result, the proposed resolution failed on June 17, 1998.

On November 11, 1998, independent of Congress, certain of the state attorneys general and the major tobacco companies, disregarding Congress' prior preemptive actions within the 1965 Federal Cigarette Labeling and Advertising Act and the Public Health Cigarette Smoking Act of 1969, reached the subject "Settlement Agreement".

The subject "Settlement Agreement" asserts that the "Settling States...are committed to reducing underage tobacco use by discouraging such use and by preventing Youth access to Tobacco Products". It then purports, without any legislative mandate, to establish "policies" for the "Settling States" "designed to reduce Youth smoking, to promote the public health and to secure monetary payments to the Settling States...which will achieve for the Settling States and their citizens significant funding for the advancement of public health, the implementation of important tobacco-related public health measures, including the enforcement of mandates and

restrictions related to such measures, as well as funding for a national Foundation dedicated to significantly reducing the use of Tobacco Products by Youth".

The "Settlement Agreement" establishes three categories of tobacco manufacturers. These are "Original Participating Manufacturer"(including those major manufacturers, controlling most of the tobacco industry, who were accused of breach of express warranties, intentional fraud or engaging in conspiracy to misrepresent or conceal material facts concerning smoking's health hazards); "Participating Manufacturer"(including those manufacturers who were anticipated to subsequently be enticed into participating), and "Non-Participating Manufacturer" (including those who refused to participate). It is asserted that the participating manufacturers control 99.5% of the subject products.

The subject "Settlement Agreement" provides an elaborate scheme for the protection of "market share" for the "Original Participating Manufacturers" and "Participating Manufacturers" by penalizing increases in operating income. The agreement further presumes to tax non-participating manufacturers and provides for the inclusion of non-affected brands upon the attainment of a specified level of sales. The Original Participating Manufacturers clearly express their intention to pass their costs to the consumers through national price increases in not only the "Settling States", but also the "Previously Settled States" and the "Non-Settling States".

Petitioners originated an action in the District Court for the Northern District of Oklahoma on December 15, 1998 by Complaint alleging that they were members of a class of persons injured as a result of actions by the named Manufacturers forbidden in the antitrust laws, including collusion to fix and regulate prices for tobacco products through the "Settlement Agreement" Original jurisdiction was vested in the District Court by 15 U.S.C. Sec. 15, 28 U.S.C. Sec. 1331 and 28 U.S.C. 1337(a). The District Court also had supplemental jurisdiction pursuant to 28 U.S.C. 1367. The Tenth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. 1291.

The Defendants filed motions to dismiss in the District Court. The District Court entered an Order converting the several Defendant's Motions to Dismiss into Motions For Summary Judgement and granted those Defendants time to supplement the record. Over Petitioners' objections, Defendants were not required to submit any undisputed facts (or documentation supporting same) as required by Local Rule 56.1. On April 30, 1999 an Order was entered granting judgement to the Defendants. From that judgement, Plaintiffs appealed to the Tenth Circuit Court of Appeals. On February 17, 2000, a three judge panel of the U.S. Tenth Circuit Court of Appeals entered it's Judgement and Order, adopting the District Court's Order. Petitioners sought review before the Court *en banc*. On March 23, 2000, Petitioners were denied rehearing.

## ARGUMENT

Petitioners complain that the District Court disregarded it's own rules, rushing to judgement before the case was at issue or discovery had. Petitioners were thus "railroaded" by premature summary judgement. Petitioners further complain that the terms of the subject settlement agreement are anticompetitive, constitute price fixing and impose an unlawful tax which the attorneys general and courts of the signatory states are not authorized to levy. These tobacco manufacturers should not be allowed to claim protection under *Illinois Brick Co. v Illinois*, 431 U.S. 720, 736 (1977) (i.e. the indirect purchaser rule) as the "tax" is paid in its entirety by consumers, and that those consumers were specifically "targeted" by these manufacturers.

These tobacco manufacturers should not be permitted to claim protection of the *Noerr-Pennington* doctrine(right to petition) *(Eastern R.R. Presidents Conference v. Noerr Motor Freight; Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965) because there has been no state action. The actions of the attorneys general and the courts of the signatory states are *ultra vires* and void. The attorneys general and the local state courts lack jurisdiction to either levy taxes on any citizen or to award damages against any citizen without notice or hearing. Alternatively, if the actions of the attorneys general and the local state courts do constitute "state action", the association of the signatory states through the Master Settlement Agreement for the

purpose of taxation and regulation of the tobacco industry creates an unlawful interstate compact, and therefore cannot be relied upon by these manufacturers.

I

The "Indirect Purchaser Rule" should not bar the opportunity of "targeted"consumers to seek relief.

The Lower Courts relied upon *Illinois Brick Co. v. Illinois*, supra., in holding: "as indirect purchasers of tobacco products, Illinois Brick bars their claim for damages here." Petitioners submit that the *Illinois Brick* case should not be dispositive of the issues presented by their Complaint because it simply does not apply. However, even if it does apply, an exception should be recognized.

The *Illinois Brick* case is distinguishable from this case because:

1. The *Illinois Brick* case involved an increase in price by the manufacturer. This case involves an industry-wide increase in cost by way of an "excise". Excises, such as the "Settlement Agreement" assessment (an excise by any other name, etc.) are always passed on to the consumer at all levels of price because the consumer is the only source of revenue for payment of an excise. The amount of the "Settlement Agreement" assessment varies according to volume of sales in a particular year. This distinguishing characteristic of the assessment establishes it as a "tax".

b. The manufacturers' total sales for a yearly period will never be exceeded by excises paid during that year. The manufacturer will not sell his goods for less than the excise because the excise is paid to a third party and remains constant regardless of the sales price.

c. Profits and other costs can be subject to the accordion affect (i.e. they are collapsible along the revenue stream). Profits and other costs were included in the price increase in *Illinois Brick*. Excises are not subject to that effect because they are constant and always payable to a third party from funds provided by consumers. They do not contain the components of profit and other costs within the control of the manufacturer, distributor or retailer.

The assessment provided by the "Settlement Agreement" has no components of profit or other cost. This case appears to present a matter of absolute first impression for this Court and falls outside the rule of *Illinois Brick* because the reasoning for the rule is inapplicable. A determination of loss to the consumer does not require any complex calculation or any complex or illusive process of separation of the Settlement Agreement "assessment" or "excise" from other profits or costs.

The Lower Courts relied upon a strict interpretation of the "indirect purchaser rule" set forth in the *Illinois Brick* case as if there were no exceptions. This interpretation conflicts with other interpretations outside the Tenth Circuit. In *In Re Lower Lake Erie Iron Ore Antitrust Ltd.*, 998 F.2d 1144 (3rd Cir.1993), the Third Circuit, in allowing an exception to the rule

of the *Illinois Brick* case and in assessing the nature of an industry-wide increase in costs, stated:

> "The relevant question is whether B&LE's antitrust activity directly impacted the steel companies. Undeniably it did. The steel companies were the sole customers of the industry involved in the transhipment of ore; indeed, the industry existed for them. True the steel companies made payments for ore movement services to various parties, defendants and nondefendants alike, but it was unquestionably the steel companies who bore the brunt of the increased costs attributed to the railroad's agreement to thwart development of the less expensive technology.
>
> The direct nature of the injury absorbs the question of causal connection. There are no missing links in the causation chain here. The correlation between the steel companies' inability to utilize the lower cost method to carry its ore and the railroad's attempt to close the ore transport market is obvious. * * * However, the steel companies suffered the greatest harm in connection with the delay of the use of the self-unloader technology. This all important, directness factor thus weighs greatly in the steel companies' favor."

In *Amarel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1997) it was succinctly stated:

"Section 4 of the Clayton Act allows recovery of treble damages by 'any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.' 15 U.S.C. Sec. 15(a). The language of this provision is very broad and, '[r]ead literally, 'could afford relief to all persons whose injuries are causally related to an antitrust violation.'' *Lucas v. Bechtel Corp.*, 800 F.2d 839, 843 (9th Cir. 1986) (citation omitted). It is well-settled, however, that despite the sweeping language of Section 4, 'Congress did not intend to provide a private remedy for all injuries that might conceivably be traced to an antitrust violation." *Bubar v. Ampco Foods, Inc.*, 752 F.2d 445, 448 (9th Cir.) (citing *Blue Shield of Virginia, Inc. v. McCready*, 457 U.S. 465, 47280 (1982)), cert. denied, _____ U.S. _____, 105 S. Ct. 3481 (1985). As the Supreme Court has explained, '[h]arm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.' *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535 (1983). Courts have developed the doctrine of antitrust standing to determine the "class of persons entitled to obtain [Section 4] damages." *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 791 F.2d 1356, 1363 (9th Cir. 1986).

> The Supreme Court has identified several factors which courts are to consider in determining whether a plaintiff, who has suffered an injury which bears a causal connection to the alleged antitrust violation, also satisfies the more demanding standard for antitrust standing. These factors are:
>
> (1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall;
>
> (2) the directness of the injury;
>
> (3) the speculative measure of the harm;
>
> (4) the risk of duplicative recovery; and
>
> (5) the complexity in apportioning damages.
>
> *Associated Gen. Contractors*, 459 U.S. at 535. Antitrust standing involves a case-by-case analysis of 'the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.' Id."

Petitioners submit that had they not been "railroaded" by premature judgement, the proof would have further verified that the subject manufacturers and the attorneys general specifically "targeted" the Master Settlement Agreement's assessment for payment by the consumers. Petitioners did provide evidence, in the form of a specific statement of intent, that established the fact of "targeting" of the consumers for payment.

It should be specifically noted that the indirect purchaser rule does not apply to requests for injunctive relief under 15 U.S.C. § 26. The underlying rule is succinctly stated in *Nationwide Mut. Ins. Co. v.*

*Automotive Service*, 490 F.Supp. 282 (1980) thus:

> "It is well established, however, that the requirements for standing under Section 4 are much more strict than those under Section 16 and therefore do not provide accurate guidance for determining standing under Section 16. *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979). Standing requirements under the latter section are less rigorous because a defendant's exposure to multiple injunctions does not involve a cumulative burden, the lack of a monetary recovery renders determination of damages unnecessary, and entitlement of one class of plaintiffs to sue does not create a disincentive for other classes." (footnote omitted)

This case is one of absolute first impression because the assessment provided by the agreement is a "true excise" which is always paid by the consumer, and none other. Petitioners in this case were directly "targeted" to suffer the resulting damage. The *Illinois Brick* doctrine has not been heretofore applied to an increase in cost amounting to an excise and Petitioners would urge this Court not to do so in this case. To do so would open the floodgates for additional abuses by way of the imposition of excises by the conspiracy of monopolistic corporations with officers and courts of the various states who lack the authority under their respective Constitutions, and deny the aggrieved victims any recourse. Congress has not prohibited such consumer action and neither

should the Courts.

II

A "Settlement Agreement" with state officers clearly acting outside the scope of their authority should not be protected under the guise of the "right to petition" to influence "state action".

In its Order, as adopted by the Tenth Circuit Court of Appeals, the District Court stated:

> "The Court finds that the actions of defendants in negotiating and executing the MSA fall within the recognition that "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose," City of Columbia, at 380 (quoting Pennington, 381 U.S. at 670), and the Court therefore concludes that the concerted effort by defendants to influence public officials, i.e., the states' Attorneys General, to accept a settlement in exchange for dismissing the numerous lawsuits pending against defendants is among the activities protected by the Noerr-Pennington doctrine."

The Lower Courts failed to note that the attorneys general were acting outside the scope of their authority by establishing state "policy" and the terms of the "Settlement Agreement" bear no real relationship to the basis of the lawsuits which were purportedly being settled. In fact, the "settlement" did not result in a specific money judgement for any of the states included therein. Although it coincidently

resulted in the dismissal of pending lawsuits, the "settlement"was designed to collect an excise tax from persons who were not parties to the lawsuits and had no participation therein, without penalty or pecuniary loss to the Defendants.

"Tax" is defined in Black's Law Dictionary, 7th Ed., as follows:

> "A monetary charge imposed by the government on persons, entities, or property to yield public revenue.
>
> * Most broadly, the term embraces all government impositions on the person, property, privileges, occupations, and enjoyment of the people, and includes duties, imposts, and excises. Although a tax is often thought to be pecuniary in nature, it is not necessarily payable in money."

"Excise" is defined in Black's Law Dictionary, 7th Ed., as follows:

> "A tax on the manufacture, sale, or use of goods (such as cigarette tax) or on the carrying on of an occupation or activity (such as a license tax or an attorney occupation fee)."

In Eastern R.R. Presidents Conference v. Noerr Motor Freight; Inc., supra., it was observed:

> "These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate

> legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution."(Emphasis Added)

In none of the "Settling States" have legislative powers, including the power of taxation, or responsibility for determining state policy, been delegated to the Attorney General or to any court. The litigation in each of the respective states sought monetary damages, which would have been deposited in each state's general fund for disposition in accordance with policies established by the legislative branch of government. Although the authority of the attorneys general varies in the various states, in none has the attorney general been allowed to usurp legislative power of taxation . To do so would clearly violate Article IV, Section 4 of the Constitution wherein a "Republican" form of government is guaranteed. However, if this Court determines that the approval of this "Settlement Agreement" does constitute "state action", it then clearly violates the Compact Clause of the United States Constitution.

III

<u>If the actions of the various Attorney's General constitute "state action, the "Settlement Agreement" constitutes an illegal interstate compact.</u>

Assuming arguendo that there was "state" action as required by *Noer-Pennington.*, the Master Settlement Agreement must fail as an illegal interstate compact prohibited by the United States Constitution, Art. I, § 10, Clause 3 which provides: " No state shall without the consent of Congress . . . enter into any agreement or compact with another state..."

A quotation from volume 77 <u>Virginia Law</u>

Review at page 1392 provides further enlightenment:

> "Many years passed before the court again addressed the issue of interstate compact and only recently did the Supreme Court resume the task of more clearly defining the characteristics of the relatively nebulous concept of a compact. The Court took the first step by resurrecting the Virginia v. Tennessee test in New Hampshire v. Maine. The Court subsequently applied the test again in United States Steel Corp. v. Multi-State Tax Commission for the first time in the context of a case involving independent interstate agency. The Court rejected the argument that the so-called multi-state tax commission pact required congressional consent. Justice Lewis F. Powell, Jr. writing for the majority noted that the pact did not 'encroach upon the supremacy of the United States' because the multi-state tax commission could not do anything that each state individually could not do.
>
> 'This pact does not purport to authorize an inter-state to exercise any powers they could not exercise in its absence.'"

Even if it is assumed that the parties to the "Agreement" have the authority to fix volume or price in the participating states, it cannot reasonably be argued that they have the authority to assess increases in volume or price in the non-participating states. Further, even if it be conceded that the participating parties have the authority to penalize

increases in volume among the participating states, there is no tenable argument, nor is there any authority, which would grant them the power to control volume of sales and the prices in the previously settled or non-participating states. Even if otherwise permissible, the choice to regulate or not regulate sales volume and/or prices in the previously settled or non-participating states is, as it should remain, within the province of those states.

In *Columbia River Gorge United v. Yeutter*, 960 F.2d 110 (9th Cir. 1992) it is succinctly stated that:

> "Under the Compact Clause, U.S. Const., art. I, 10, cl. 3, any interstate agreement that increases the political power of states must be approved by Congress. "The relevant inquiry must be one of impact on [the] federal structure." *United States Steel Corp. v. Multistate Tax Comm'n.*, 434 U.S. 451, 471, 98 S.Ct. 799, 812, 54 L.Ed. 2d 682 (1978)."

In the instant case, it appears that the Attorneys General of "settling states", have sought to bind their respective states and others, to an interstate compact, the terms of which will inevitably impact the "non-settling states" and which, in similar terms, was specifically rejected by the U.S. Congress. Such an intrusion upon the sovereignty of the "non-settling states" and the supremacy of Congress in matters of interstate commerce should not be condoned.

IV

District Court's should not utilize *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), as an instrument to avoid their own rules and prematurely rush to judgement.

Respondents filed motions to dismiss prior to the time they were required to file an Answer. Pending a Case Management Conference pursuant to local court rules and the disposition of pending objections as to the sufficiency of the Complaint, attempts at discovery were suspended by agreement of the parties. Thereafter, the District Court converted Defendants' motions to dismiss to motions for summary judgement and gave Defendants time to supplement their motions, assumably, "...to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. Proc. Rule 12(b); and, gave Plaintiffs time thereafter to supplement their response. At no time did the Defendant's "...present... material made pertinent to such a motion by Rule 56" nor did they, at any time, comply with Local Rule 56.1 of the Rules for the United States District Court for the Northern District of Oklahoma ; thereby, giving rise to repeated objections by Petitioners'/Plaintiffs, including, a "Motion For Default Judgement Or, In The Alternative, Motion To Compel Compliance With Rules". On April 30, 1999, prior to any discovery, the District Court sustained "the motions for summary judgement filed by defendant's" and ordered that "judgement is entered for defendants and against plaintiffs on all plaintiffs' claims".

In its Order, the District Court observed:

> "In considering a motion for summary judgment, the Court "has no real discretion in

determining whether to grant summary judgement." *U.S. v. Gammache*, 713 F.2d 588,594 (10th Cir. 1983). The Court must view the pleadings and documentary evidence in the light most favorable to the nonmovant, *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526,527-28 (10th Cir.1994), and summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). 'A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' *Akin v. Ashland Chemical Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998). '[T]he moving party carries the burden of showing beyond a reasonable doubt that it is entitled to summary judgement.' *Hicks v. City of Watonga*, 942 F.2d 737, 743 (10th Cir. 1991) (quoting *Ewing V. Amoco Oil Co.*, 823 F.2d 1432, 1437(10th Cir. 1987)). However, once the moving party meets its burden, the burden then shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter. *Bacchus Indus.. Inc. v. Arvin Indus. Inc.*, 939 F.2d 887, 891(10th Cir. 1991). The 'party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but... must set forth specific facts showing that there is a genuine issue for trial.' *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 248 (1986) (citations omitted)."

The District Court omitted from its

consideration additional standards, including those alluded to in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), wherein it is observed:

> "Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence."

And,

> ...The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f)6 which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery."

In arriving at its judgement, the Lower Court chose to rely upon numerous unsupported, self-serving, and speculative conclusions made by Defendants in the text of their arguments, instead of "ultimate facts". No "ultimate facts" were available upon which the Lower Court could rely. The Lower Court's Order of April 30, 1999 stated, at footnote 4, that:

> "These facts are cited in defendant's brief in support of their motion and in their exhibit accompanying their motion. Plaintiffs do not contest these facts."

In fact, as Petitioners repeatedly pointed out, there were essentially no "facts" presented to the Lower Court which Petitioners could contest within

the perimeters of Local Rule56.1B. In fact, both Defendants' brief in support of their motion and their exhibit accompanying the motion (and, consequently, the District Court's Order) are so rife with self-serving declarations and conclusions that they defy any logical rebuttal within the context or the spirit of either Fed R. Civ. P. 56 or Okla. N. Dist. Local Rule 56.1. This scenario gives rise to at least three principle questions which, it is respectfully submitted, should be addressed:

> 1. May the Lower Court favor one party over another in its application of procedural rules?

And,

> 2. May the Lower Court rely upon undocumented self-serving declarations and conclusions, rather than "ultimate facts", in support of summary judgement?

And,

> 3. Must a party, in response to a motion for summary judgement, address any possible permutation which might be derived from the adverse parties' argument or exhibits prepared in contemplation of litigation, or must a party address only "ultimate facts" supported by reliable evidence in the form of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits"?

It is respectfully submitted by Petitioners that each of these questions should be forcefully answered in the negative.

## CONCLUSION

This action is one of great significance, involving important federal questions. The character

of this scheme, which was developed in concert between the major tobacco manufacturers and various of the state Attorneys General, is historic and unprecedented. The impact of this subterfuge clearly falls upon all citizens, whether or not they are consumers of tobacco products, since it serves as a pattern for those who would seek to control elements of our society (whether it be control of tobacco, firearms, foodstuff, transportation or other matters) through means other than the democratic process. Obviously, this course of action will be, and is being, emulated in all matters in which there exists dissatisfaction with democratic process and the fervent desire by an influential minority to effectuate public policy through subterfuge instead of through the appropriate legislative bodies.

The Lower Court Decisions adopt a rigid interpretation of the *Illinois Brick* "indirect purchaser rule"inconsistent with other Circuit Courts herein noted, and apparently inconsistent with this Court's analysis of standing. This completely overlooks the principle that the "indirect purchaser rule" is applicable only in relation to damages, and not in consideration of injunctive relief. In addition, the Lower Courts appear to assume that plaintiffs need to establish a price increase as a result of the agreement. Plaintiffs should not be required to do so. The "excise" imposed by the agreement is present at all levels of pricing. See: *In Re Lower Lake Erie Iron Ore Antitrust Ltd.*, supra.

The Lower Courts, in applying the *Noerr-Pennington* "right to petition" or "state action" exception, appear to overlook the threshold question of examining the state officer's authority, jurisdiction

and limitations. In none of the settling states is the attorney general, even with the approval of the local district or county judge of his choice, entrusted with statewide or national legislative authority.

The Lower Courts completely ignore the question of whether the Attorneys General, if acting on behalf of their respective states, have formed an unlawful confederation or interstate compact. If their actions do constitute "state action", this is clearly the case.

Finally, The Lower Courts completely ignore the question of whether limitations exist upon the District Court's application of the standards set forth in *Celotex Corp. v. Catrett*, supra. Should the application of the *Celotex* summary judgement standards be limited, as the language implies, to situations in which parties have had full and adequate discovery? Should *Celotex* be applied, at all, to motions to dismiss which have been converted to motions for summary judgement under Rule 12(b) of the Federal Rules of Civil Procedure? May a District Court, in deciding such motions, waive local court rules without notifying the parties of it's intention to do so? Petitioners submit that each of these questions should be addressed, and answered in the negative. This would provide the necessary guidance to the lower courts and provide the parties with a much fairer forum.

For these reasons, a writ of certiorari should issue to review the Judgement and Opinion of the Tenth Circuit.

Respectfully Submitted,

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APPENDIX
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEO HISE and JACK ISCH,
individually and as
representatives of a class of
others similarly situated,
Plaintiffs,

vs.. No. 98-CV-947-C

PHILIP MORRIS INC. (a Virginia
Corp.), R. J. REYNOLDS
TOBACCO CO. (a New Jersey
Corp.), BROWN & WILLIAMSON
TOBACCO CORP. (a Delaware
Corp.), LORILLARD TOBACCO
CO. (a Delaware) Corp.), and THE
LIGGETT GROUP d/b/a LIGGETT
AND MYERS TOBACCO CO.
(a Delaware Corp.),
Defendants.

ORDER

Pending before the Court are the motions for summary judgment filed by defendants, pursuant to Rule 56 of the Federal Rules of Civil Procedure.[1]

On December 15, 1998, plaintiffs filed the present action, purportedly on behalf of themselves

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1. Defendants, Philip Morris, R.J. Reynolds, Brown & Williamson, and Lorillard filed their motion jointly, which defendant Liggett, subsequently adopted in its separate motion.

and a class consisting of an estimated 40 million consumers of defendants' tobacco products, pursuant to Rule 23.[2] Plaintiffs allege in their Complaint that defendants have engaged in, and are currently engaging in, certain unlawful activities arising out of, and related to, defendants' performance of a settlement agreement which they entered into with more than 40 states, and plaintiffs allege that such unlawful activities have caused, and are currently causing, harm to them. Specifically, plaintiffs allege that, subsequent to entering into a settlement with the settling states, defendants have jointly, and unlawfully, agreed to raise tobacco prices in order to pay the costs of the settlement, in violation of federal antitrust laws.[3] Plaintiffs further allege that defendants' action in so raising tobacco prices amounts to a deprivation of plaintiffs' property interest without due process of law, in violation of plaintiffs' constitutional rights. Plaintiffs also allege that the parties to the settlement agreement have presumed to assume regulations and governance over the manufacture, interstate trade and consumption of

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2. The Court declines plaintiff's invitation to treat the present action as a class action under Rule 23.

3. Plaintiffs represent in their response brief to defendants' present motions that the first count of their Complaint alleges an unlawful collusion between the Attorneys General of the various settling states and defendants to fix prices of tobacco products. Plaintiffs allege that the settlement agreement is nothing more than a sham designed to assess damages or taxes against the consumers of tobacco products.

tobacco products, presumably in violation of the Constitution.

Defendants have not answered plaintiffs' Complaint, but they filed motions to dismiss on February 1, 1999, and February 5. Because the Court was asked to consider materials outside the pleadings, the Court converted defendants' motions to dismiss into motions for summary judgment on March 17, and the Court gave defendants 15 days in which to supplement their motions. The Court additionally gave plaintiffs 15 days thereafter in which to supplement their response. The parties have filed their supplemental papers, and defendants' present motions are now ripe for ruling.

Facts

The following material facts are undisputed[4] At various times preceding the institution of the present action, more than 40 states, including Oklahoma, filed lawsuits against numerous tobacco companies and, manufactures, including the defendants herein. The states filed the suits for the purposes of furthering their policies regarding public health and reducing underage consumption of tobacco products, and the states requested monetary, equitable and

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4. These facts are cited in defendants' brief in support of their motion-and in their exhibit accompanying their motion. Plaintiffs do not contest these facts.

injunctive relief.[5] Desiring to avoid the enormous expense and delay inherent in such litigation, the states and tobacco companies agreed to enter into negotiations with the aim of settling their various disputes. Ultimately, the negotiations succeeded, and in November 1998, the tobacco producing and manufacturing defendants, including the defendants herein, entered into a Master Settlement Agreement (MSA) with the plaintiff states. The MSA is designed to achieve for the settling states funding for the advancement of public health, the implementation of tobacco-related health measures, and funding for a national foundation dedicated to reducing underage consumption of tobacco products. The MSA contains detailed formulas governing the timing and amounts payable by the tobacco companies to each of the settling states, and the implementation of the MSA is to be overseen by the National Association of Attorneys General.

On November 23, 1998, the State of Oklahoma, through its Attorney General, agreed to the MSA, and on December 1, 1998, the District Court for Cleveland

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5. The MSA states that, the Settling States that have commenced litigation have sought to obtain equitable relief and damages under state laws, including consumer protection and/or antitrust laws, in order to further the Settling States' policies regarding public health, including policies adopted to achieve a significant reduction in smoking by Youth.... Settling State officials believe that entry into this Agreement and uniform consent decrees with the tobacco industry is necessary in order to further the Settling States' policies designed to reduce Youth smoking, to promote the public health and to secure monetary payments to the Settling States.

County entered a uniform Consent Decree and Final Judgment, approving the MSA and dismissing Oklahoma's claims. The District Court specifically found that entering into the MSA is in the best interests of the State of Oklahoma. The MSA was attached to the Consent Decree and Final Judgment, and filed therewith.[6] Subsequent to entering into the MSA, defendants raised the price of their tobacco products, presumably to cover the costs of the settlement.

## Standard of Review

In considering a motion for summary judgment, the Court "has no real discretion in determining whether to grant summary judgment." U.S. v. Gammache, 713 F.2d 588,594 (10th Cir. 1983). The Court must view the pleadings and documentary evidence in the light most favorable to the nonmovant, Cone v. Lonamont United Hosp. Assn, 14 F.3d 526, 527-28 (10th Cir. 1994), and summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

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6. Plaintiffs, in their response brief, claim that the term "Master Settlement Agreement" is misleading, as the MSA is merely an offer to settle pending claims for damages on an annual basis. However, because the settling states, including Oklahoma, specifically agreed to the MSA and incorporated it into their Consent Decree and Final Judgments, which were then accepted and entered by the respective state courts in which the lawsuits were pending, the MSA clearly constitutes the actual settlement agreement between the several settling states and the tobacco companies.

show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. " Akin v. Ashland Chemical Co., 156 F.3d 1030, 1034 (10th Cir. 1998). "'[T]he moving party carries the burden of showing beyond a reasonable doubt that it is entitled to summary judgment. '" Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991) (quoting Ewing v. Amoco Oil Co., 823 F.2d 1432, 1437 (10th Cir. 1987)). However, once the moving party meets its burden, the burden then shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter. Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir. 1991). The "party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242,248 (1986) (citations omitted).

## Discussion

Upon a careful review of plaintiffs' Complaint, defendants' and plaintiffs' submissions in relation to defendants' motions for summary judgment, and the relevant law, the Court is convinced that defendants have shown, beyond a reasonable doubt, that they are entitled to summary judgment, even at this early stage in the proceedings. Because the Complaint and

the allegations contained therein must fail as a matter of law, the Court sees no reason to burden defendants with the additional time and expense involved in proceeding to discovery.

With respect to plaintiffs' first claim, alleging a violation of Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1, the Court agrees with defendants that the Noerr-Pennington doctrine and the Illinois Brick indirect purchaser rule preclude recovery of damages here. The Noerr-Pennington doctrine, based on the Supreme Court's decisions in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and United Mine Workers of America v. Pennington, 381 U.S. 657 (1965), holds generally that a private entity's right to petition the government, including the judiciary, is immune from federal antitrust claims, regardless of any anti-competitive intent or consequences, unless such conduct or action is a "sham." See also City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 379-380 (1991) ("federal antitrust laws ... do not regulate the conduct of private individuals in seeking anticompetitive action from the government [and] Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose"); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (the right to petition extends to all departments of the government, including the courts). "The 'sham' exception to Noerr encompasses situations in which persons use the governmental process - as opposed to the outcome of that process - as an anticomptetitive weapon...[and a]

'sham' situation involves a defendant whose activities are 'not genuinely aimed at procuring favorable government action' at all." City of Columbia, 499 U.S. at 380 (citations omitted).

Defendants argue that, to the extent plaintiffs claim that defendants violated the antitrust laws by negotiating and entering into the MSA, such activity is protected under the Noerr-Pennington doctrine as conduct incidental to litigation. Defendants assert that, subsequent to being sued by over 40 states in the respective state courts, they entered into the MSA to compromise these lawsuits. Defendants contend that the MSA represents defendants' joint defense of the state actions, and, once the MSA was approved by the various states, the MSA represents the product of defendants' petitioning of the settling states and the judiciary. Defendants further argue that the MSA is protected as a contract with government officials. Defendants point to plaintiffs' concession that the MSA was a compromise agreement reached between defendants and the several states that had initiated lawsuits against defendants. Defendants therefore maintain that both the negotiation phase and the resulting agreement with the states fall within the protections afforded by the Noerr-Pennington doctrine.

Plaintiffs counter that the Noerr-Pennington doctrine does not apply here because the MSA amounts to a "tax" upon consumers of tobacco products, and plaintiffs list several reasons why they believe that the MSA constitutes a tax. Plaintiffs further contend that the states lacked the authority to

levy such a tax. Strikingly absent from plaintiffs' argument on this issue, however, is any citation to any authority whatsoever. In contrast to the abundance of authority supporting defendants' arguments, plaintiffs apparently cannot cite to any supporting their theory.[7] Plaintiffs additionally argue that the settling states and defendants lack the authority to assess and collect damages against plaintiffs. Plaintiffs base this claim on the fact that the MSA assessment was intended to be collected from them in the form of higher prices on tobacco products. Again, however, plaintiffs cite to no supporting authority. [8]

The Court is satisfied that defendants' activities, in negotiating the MSA with the several settling states and achieving a settlement agreement with those states, are protected under the Noerr-Pennington doctrine as conduct incidental to litigation. See Lemelson v. Bendix Corp., 104 F.R.D. 13, 18 (D.De. 1984) (defendants have a right to take joint legal action in response to a common problem, and their joint defense, standing alone, cannot provide any basis for antitrust liability). The Court agrees with defendants that the doctrine would surely

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7. At most, plaintiffs cite to the constitutions of the United States and Oklahoma. However, these citations do not address the issues presented herein, and they do not support plaintiffs' arguments.

8. Plaintiffs also contend that Due Process requires notice and an opportunity to be heard before one can be deprived of his property. The Court will address this argument below.

ring hollow if it failed to encompass private entities who, after having been sued by one or more states for similar conduct, jointly petition the states in order to achieve a mutually acceptable settlement, designed to reduce the amount of time and expense involved in defending the action. Under the doctrine, the fact that the private defendants' motives are selfish is irrelevant, City of Columbia, 499 U.S. at 380, and so too is the fact that the result may have anti-competitive consequences. See Greenwood Utilities Comm'n v. Mississippi Power Co., 751 F.2d 1484, 1497 (5th Cir. 1985) (The Noerr-Pennington doctrine "allows individuals or businesses to petition the government, free of the threat of antitrust liability, for action that may have anticompetitive consequences. Noerr-Pennington protection is grounded on the theory that the right to petition guaranteed by the First Amendment extends to petitions for selfish, even anticompetitive ends.").

The Court finds that the actions of defendants in negotiating and executing the MSA fall within the recognition that "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose," City of Columbia, at 380 (quoting Pennington, 381 U.S. at 670), and the Court therefore concludes that the concerted effort by defendants to influence public officials, i.e., the states' Attorneys General, to accept a settlement in exchange for dismissing the numerous lawsuits pending against defendants is among the activities protected by the Noerr-Pennington doctrine. Further, although plaintiffs' Complaint labels the MSA as a "sham", the

Court finds no evidence which even remotely suggests that defendants intended to use the MSA as an anti-competitive weapon to exclude or harass competitors.

Defendants additionally argue that, as indirect purchasers of tobacco products, plaintiffs do not have standing to assert a federal antitrust claim for damages. For this argument, defendants rely on the Supreme Court's decision in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), which held that, indirect purchasers do not have standing to recover damages resulting from antitrust violations. The Court, reiterating the rationale of Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), stated that the judicial procedures and economic theory required in claims tracing antitrust injuries from the producers to ultimate consumer were too complicated to warrant granting standing to indirect plaintiffs. Illinois Brick, 431 U.S. at 737-43.... The Court implied that by limiting standing to direct purchasers, the Court hoped to insure aggressive and efficient enforcement of suits against antitrust violations. Id. at 745-47." Emerson, Voluntary Restraint Agreements and Democratic Decisionmaking, 31 Va.J.Int'l.L. 281, n.131 (1991).

See also Sports Racing Services, Inc. v. Sports Car Club of America, Inc., 131 F.3d 874, 889 (10th Cir. 1997) ("The Illinois Brick rule selects the better plaintiff between two possible types of plaintiffs -direct purchasers and indirect purchasers. The Court chose the direct purchaser primarily to simplify damages determinations and limit the possibility of multiple

recovery against the defendant."). Defendants argue that, since plaintiffs do not allege that they are direct purchasers of defendants' tobacco products, they lack standing to recover damages here.[9]

Plaintiffs argue that Illinois Brick is inapplicable because this case "involves an industry-wide increase in cost by way of an excise." Plaintiffs contend that but for the assessment of the MSA, tobacco products would be sold at the present prices less the MSA assessment. Plaintiffs also argue that the indirect purchaser rule does not apply to requests for injunctive relief.

The Court agrees with the position taken by defendants. Illinois Brick and its progeny make clear that only direct purchasers, and no others in the chain of manufacture and distribution, have standing to bring an action for damages under the federal antitrust laws.[10] See Kansas v. Utilicorp United, Inc. 497 U.S. 199 (1990) (reaffirming Illinois Brick direct purchaser rule). Plaintiffs' attempts to distinguish this case lack merit, and the Court concludes that, as indirect purchasers of tobacco products, Illinois Brick

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9. Defendants represent that they do not sell their tobacco products to ultimate consumers, such as plaintiffs, but only to distributors. Further, plaintiffs do not allege that they purchase tobacco products directly from defendants.

10. Certain limited exceptions to the direct purchaser rule have been recognized, none of which apply here. In re Wyoming Tight Sands Antitrust Cases, 866 F.2d 1286, 1290 (10th Cir. 1989).

bars their claim for damages here.[11]

Notwithstanding the above discussion, however, the Court recognizes that although plaintiffs' Complaint seems to be directed almost entirely at the MSA,[12] plaintiffs are essentially attacking the increase in prices of defendants' tobacco products which occurred after the execution of the MSA. While the Court has concluded that the negotiation and ultimate execution of the MSA are protected activities under the Noerr-Pennington doctrine, this does not address the allegation that defendants conspired to set a price for their products following execution of the MSA. Of course, the Court does not believe that defendants were free at any time, either prior to or after execution of the MSA, to enter into a conspiracy to fix tobacco prices. See SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 962 (10th Cir. 1994) (Section 1 of the Sherman Act forbids agreements in restraint of trade, and price-fixing agreements, being devoid of redeeming competitive rationales, are per se illegal). However, construing plaintiffs' first claim as alleging a conspiracy to fix tobacco prices either during the negotiation phase of the MSA or after the MSA was

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11. As the Court found and concluded above, Plaintiffs' claims for both damages and injunctive relief with respect to the negotiation and execution of the MSA are barred by the NoerrPennington doctrine.

12. In their response brief to defendants' present motions, plaintiffs state that it is their "position ... that the terms of the [MSA] are unlawful and prohibited."

executed, the Court concludes that the claim must fail.

First, Illinois Brick, supra, bars plaintiffs' claim for damages even if defendants did, in fact, conspire to fix prices following the execution of the MSA. Second, regarding plaintiffs' claim for injunctive relief, which defendants concede is not precluded by Illinois Brick, the Court agrees with defendants that plaintiffs failed to adequately plead a price-fixing conspiracy. Indeed, plaintiffs' Complaint contains the very type of bare bones allegation of a price-fixing conspiracy that the Tenth Circuit has held to be *insufficient to* state an antitrust claim.[13] TV Communications Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1026 (10th Cir. 1992). Further, even construing plaintiffs' response to defendants' present motions as presenting additional factual allegations in support of their claim, plaintiffs allege, at most, and without any corroborating evidence, that defendants jointly determined, along with the various Attorneys General of the settling states, that the costs of the MSA could be, and would be, passed along to the consumers, [14]

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13. Plaintiffs merely allege in their Complaint that "Defendants have raised the prices of their tobacco products in order to pay the costs of the 'settlement agreement' contract which restrains trade. These price increases were made by the Defendants, each in collusion with the other in restraint of trade in violation of the anti-trust laws of the United States."

14 Defendants specifically represent to the Court that no provision in the MSA required them to increase tobacco prices, and plaintiffs have not pointed to any such provision.

and plaintiffs allege that defendants announced to their wholesalers and retailers prior to the execution of the MSA that they would be increasing the prices of their tobacco products because of the settlement. However, no where do plaintiffs suggest that defendants actually conspired to fix tobacco at a certain price or price range. Nor is there any direct evidence that defendants jointly agreed that any or all of them would increase the prices of their respective tobacco products to cover the costs of the settlement.

Additionally, plaintiffs have not offered sufficient circumstantial evidence of an illegal agreement to survive defendants' summary judgment motions. Merely because defendants may have acknowledged amongst themselves their otherwise independent decisions to increase the price of their respective tobacco products by an indeterminate amount following execution of the MSA to cover the costs of the settlement, and simply because defendants did, in fact, raise their prices to one degree or another following execution of the settlement,[15] it does not necessarily follow that defendants thereby violated § 1 of the Sherman Act. As the Court notes below, it makes perfect economic and business sense for manufacturers and producers, when assessed an enormous liability arising out of a harm caused by their products, to seek to pass along and spread the loss to the ultimate consumer by raising the prices of

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15. Plaintiffs do not allege that each defendant raised the price of its tobacco products in an amount equal to that of every other defendant following execution of the MSA.

their products, and it would have indeed been a strange business decision for each defendant to not have increased the price of its tobacco products *following execution of the MSA.*

Plaintiffs have therefore shown, at most, that defendants entered into a uniform settlement with several states and subsequently raised the prices of their tobacco products. However, "[a]mbiguous conduct that is as consistent with permissible competition as with illegal conspiracy does not by itself support an inference of antitrust conspiracy under Sherman Act section 1." Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof I Publications, Inc., 63 F.3d 1540, 1556 (10th Cir. 1995). While parallel behavior may contribute to a finding of antitrust conspiracy, it is insufficient, in and of itself, to prove a conspiracy. Cayinan Exploration Corp. v. United Gas Pipeline Co., 873 F.2d 1357, 1361 (10th Cir. 1989). It appears to the Court that defendants, in raising the prices of their respective tobacco products, acted independently of each other out of a legitimate and reasonable business interest of passing the costs of the settlement on to the ultimate consumer, and plaintiffs presented no evidence tending to exclude this possibility. [16] See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) (to

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16. The Court agrees with defendants that "the most rational inference from [plaintiffs'] alleged facts is that the economic burdens imposed on each of the manufacturers under the MSA caused or contributed to each defendant's independent decision to raise prices."

survive a motion for summary judgment, a plaintiff alleging a violation of §1 of the Sherman Act must present evidence that tends to exclude the possibility that the alleged conspirators acted independently).

Plaintiffs' second claim is that defendants' action in raising prices of tobacco products amounts to a deprivation of plaintiffs' property interest without due process of law, in violation of plaintiffs' constitutional rights. Plaintiffs specifically allege that they have been "deprived of a property interest without due process of law contrary to the due process mandate of the U.S. [Constitution] . . ., because the 'damages' paid to States by Defendants under the 'settlement agreement' contract are being assessed against Plaintiffs without Plaintiffs being made parties to the actions previously filed in the separate States." The frivolity of this allegation is plain from its face, and plaintiffs support it with the citation to no relevant authority. By entering into the MSA, the settling states and defendants did not deprive plaintiffs of any property interest in violation of Due Process. Indeed, plaintiffs clearly have no recognized property interest in paying a certain sum to a retailer to purchase a tobacco product. Further, the "damages" allegedly assessed in the MSA are not assessed against plaintiffs. The sums agreed to under the MSA, rather, are assessed against, and payable by, defendants. The fact that defendants intended to pass such losses on to the consumers of their products is simply a reality of business. When a particular manufacturer is found liable for creating a certain risk which harms a consumer, it is not at all

odd for the manufacturer to seek to cover its losses by increasing the price of its product, thereby passing the loss on to the ultimate consumer. From the Court's experience, this is a common practice. If plaintiffs were to succeed here, then every time a manufacturer is held liable, or agrees to settle a dispute, and thereafter increases the price of its product in order to cover the damages it is required to pay, all consumers of its product could bring an action alleging a due process violation. The absurdity of such a result is plain. Since plaintiffs have no recognized or cognizable property interest in paying an expected amount for tobacco products, this claim must fail. [17]

In their third claim, plaintiffs allege that the parties to the settlement agreement have presumed to assume regulations and governance over the manufacture, interstate trade and consumption of tobacco products. This claim is presumably based on the United States Constitution, but the claim does not point to a violation of any specific law. In their response brief to defendants' present motions, however, plaintiffs attempt to clarify this claim. Citing Article I, § 10 of the Constitution, Plaintiffs allege that the parties to the MSA formed an unlawful confederation, arguing that the parties created a de facto government by entering into and executing the MSA. Plaintiffs cite no authority for their extraordinary claim, and the Court finds and

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17. The Court further notes that plaintiffs failed to adequately allege state action.

concludes that this claim is plainly ftivolous.

Accordingly, the Court hereby GRANTS defendants' motions for summary judgment. All other pending motions filed in this case are hereby rendered MOOT by entry of this Order.[18]

IT IS SO ORDERED this 29th day of April, 1999.

H. DALE COOK
United States District Judge

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18. Plaintiffs' counsel, Bill Sellers, filed a motion and complaint on April 19,1999, seeking to have all parties to the MSA taken into custody by the United States Marshal Service and charged with fraud and conspiracy to steal money from the people, presumably consumers of tobacco products. This motion and complaint is utterly frivolous.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LEO HISE and JACK ISCH, both individually and as representative of a class of others similarly situated,
Plaintiffs - Appellants.
v

PHILLIP MORRIS INCORPORATED, a Virginia Corporation; R. J. REYNOLDS TOBACCO COMPANY, a New Jersey Corporation; BROWN & WILLIAMSON, a Delaware Corporation; LORILLARD TOBACCO COMPANY, a Delaware Corporation; LIGGETT GROUP INC., sued as: The Liggett Group, a Delaware Corporation d/b/a Liggett and Myers Tobacco Company,
Defendants - Appellees.

No. 99-5113

A.D. BEDELL WHOLESALE COMPANY, INC.,
Amicus Curiae.

ORDER AND JUDGMENT

Before BRORBY, KELLY and MURPHY, Circuit Judges.

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*This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir.R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1.9(G). The case is therefore ordered submitted without oral arguments.

Applicants Leo Hise and Jack Isch appeal the district court's decision granting summary judgment to the Appellees (hereinafter "tobacco companies"), and also appeal its order denying their motion for default judgment. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

A. Factual Background

The undisputed facts giving rise to this controversy are chronicled in the district court decision. *See Hise v. Philip Morris, Inc.*, 46 F.Supp.2d 1201, 1204 (N.D. Okla. 1999). In short, over forty states, including Oklahoma, commenced litigation against numerous tobacco concerns, including the named tobacco companies, requesting monetary and other relief for claims related to public health and underage tobacco consumption issues. *Id.* To avoid

the expense and delay inherent in litigation, the litigants entered into a settlement agreement designed to provide states funding for various tobacco-related health programs and measures. *Id.* Following the settlement, the tobacco companies involved in this suit raised the price of their products, presumably to cover the settlement costs. *Id.*

B. Procedural Background

Mr. Hise and Mr. Isch, individual over-the-counter tobacco consumers, filed a complaint on behalf of themselves and a purported class of an estimated forty million consumers, alleging the tobacco companies unlawfully entered into a "sham" settlement agreement.[1] *Id.* at 1203 & n.3. Specifically, they claimed the tobacco companies engaged in unlawful activities to: (1) raise tobacco prices in order to pay for the settlement in "collusion" with the various state Attorneys General, in violation of the Sherman Anti-Trust Act; (2) deprive tobacco consumers of their property interest without due process of law in violation of their constitutional rights; and (3) regulate and govern the manufacture, interstate trade and consumption of tobacco products in violation of the United States Constitution. *Id.* at 1203 & n.3.

The tobacco companies did not file an answer to the complaint, but instead filed motions to dismiss.

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1. Hereafter, any reference to Mr. Hise and Mr. Isch refers also to all the purported class-action Appellants.

*Id.* at 1204. Because these motions requested consideration of materials outside the pleadings,[2] the district court issued an Order on March 17, 1999, converting the tobacco companies' motions to dismiss into motions for summary judgment pursuant to Federal Rule of Civil Procedure 12(b). The order gave the companies fifteen additional days to supplement their motions and gave Mr. Hise and Mr. Isch fifteen days to respond. *Id.*

After the tobacco companies filed their supplemental motions, Mr. Hise and Mr. Isch filed a "Motion for Default Judgment or in the Alternative Motion to Compel Compliance With Rules," in which they asked the district court to either enter a default judgment against the tobacco companies for failing to file an answer within twenty days after the March 17, 1999 Order, or alternatively, to compel the tobacco companies to comply with the Federal Rules of Civil Procedure and the district court's local rules. Specifically, in their supporting brief, Mr. Hise and Mr. Isch requested default judgment against the tobacco companies because their supplemental motions did not set forth: (1) a section containing a concise statement of duly numbered paragraphs of material facts, as required under the district court's local rules of civil procedure, Rule 56.1B, or supporting affidavits; or (2) any responsive pleading

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2. The district court does not explicitly indicate what outside evidence it considered, but from a review of the record, it is evident this evidence consisted of the settlement agreement and the statements therein.

which admits or denies the allegations in the complaint, in accordance with Fed. R. Civ. P. 12.

At a status hearing, the district court (1) denied Mr. Hise's and Mr. Isch's motion for default judgment in its entirety, and (2) allowed the tobacco companies the right to file their answers within ten days after any adverse ruling on their summary judgment motions. In addition, the parties agreed to delay discovery pending the district court's ruling on the summary judgment motions.

Thereafter, the district court entered a decision granting the tobacco companies summary judgment. The district court rejected Mr. Hise's and Mr. Isch's first claim that the settlement agreement violates the Sherman Anti-Trust Act. *Hise*, 46 F.Supp.2d at 1205. In so holding, the district court determined the tobacco companies' action in negotiating and executing the settlement agreement fell under the protections of the "Noerr-Pennington" doctrine which shields from the Sherman Anti-Trust Act any concerted effort to influence public officials, regardless of intent or purpose. *Id.* at 1206-07. The court also determined Mr. Hise and Mr. Isch, as indirect purchasers of tobacco, lacked standing under the "Illinois indirect purchaser rule" to pursue monetary damages. *Id*, at 1207-1208. As to injunctive relief, the district court determined Mr. Hise and Mr. Isch failed to adequately plead a price-fixing conspiracy in either their complaint or other responsive pleadings. *Id.* at 1208.

The district court also rejected as friviolous Mr.

Hise's and Mr. Isch's second claim that the tobacco companies' actions in raising prices deprived consumers of a property interest without due process of law. *Id.* at 1209. The district court concluded Mr. Hise, Mr. Isch, and the other consumers possessed no clearly recognized property interest in paying a certain sum to a retailer to purchase tobacco. *Id.* Similarly, the district court rejected, as frivolous and unsupported by legal authority, Mr. Hise's and Mr. Isch's third claim, alleging the parties to the settlement agreement conspired to regulate and govern the manufacture, interstate trade and consumption of tobacco products.

On appeal, Mr. Hise and Mr. Isch renew essentially the same arguments presented to, and addressed by, the district court in its decision granting summary judgment in favor of the tobacco companies. They also renew the same issues raised in their motion for default judgment, which the district court summarily denied at the status hearing. In addition, for the first time on appeal, Mr. Hise and Mr. Isch contend the district court erred in converting the tobacco companies' motions to dismiss to summary judgment motions, claiming instead that the district court should have allowed them to refile or amend their complaint to correct any deficiencies, as allowed under Fed. R. Civ. P. 15.[3]

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3. In addition, A.D. Bedell Wholesale Company, Inc. filed an *amicus curiae* brief in favor of Mr. Hise and Mr. Isch, claiming the district court sweepingly applied the "Noerr'Pennington doctrine" without the necessary "closer examination of the terms of the

## C. Discussion

### 1. Conversion of Motions to Dismiss and Amendment of Complaint

We begin with Mr. Hise's and Mr. Isch's contentions concerning the district court's conversion of the tobacco companies' motions and alleged error in not allowing them to amend their complaint. While we do not ordinarily consider arguments raised for the first time on appeal, we note the issues raised here lack merit. *See United States v. Alamillo*, 941 F.2d 1085, 1086 (10th Cir. 1991). Specifically, we feel compelled to point out that under Rule 12(b)(6), a district court has broad discretion in determining whether to consider materials outside of the pleadings, and if the court choses to consider such material, it must treat a motion to dismiss as a motion for summary judgment. *See Lowe v. Town of Fairland*, 143 F.3d 1378, 1381 (10th Cir. 1998). If, as here, the district court decides to convert a motion to dismiss into a summary judgment motion, it must provide notice to the opposing party and an

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[settlement agreement] itself and the circumstances pursuant" thereto. The tobacco companies filed a motion requesting permission to file a supplemental response, as attached to their motion, to the *amicus* brief. Shortly thereafter, A.D. Bedell Wholesale Company filed a similar motion requesting permission to file a supplemental response, as attached to its motion, to the tobacco companies' responses to its brief. We deny both motions, holding supplemental responses unnecessary in this case. However, in so doing, we note we have reviewed the responsive briefs, and conclude that even if considered, they would not affect our disposition in this case.

opportunity for him to serve opposing affidavits. *See Hall v. Bellmon*, 935 F.2d 1106, 1110-11 (10th Cir. 1991). These affidavits must create a genuine issue for trial. *Id.* at 1111.

In this case, the district court considered material outside the pleadings, and therefore properly converted the motions to dismiss into summary judgment motions.

In so doing, he provided both parties with notice, allowing the tobacco companies fifteen days to supplement their motions and Mr. Hise and Mr. Isch fifteen days to respond thereto. Under the circumstances presented, the district court clearly did not abuse its discretion in converting the motions. While Mr. Hise and Mr. Isch responded to the tobacco companies' supplemented motions, they did so only through a motion for default judgment, and not any affidavit or other evidence creating a genuine issue for trial. Moreover, given their failure to move to amend their complaint, and based on our review of the complaint and other pleadings, the district court did not err in converting the motions, rather than recommending Mr. Hise and Mr. Isch amend their complaint.

2. Default Judgment Motion

Mr. Hise and Mr. Isch correctly point out that under Rule 55, default judgment shall be entered if a party fails to plead or "otherwise defend." Fed. R. Civ. P. 55(a). Applying this rule, they contend the district court should have entered default judgment because the tobacco companies did not file an answer to their

complaint after the district court "denied" or "postponed" the tobacco companies' motions to dismiss. We disagree.

Decisions on whether to enter default judgment fall within the district court's discretion, and we review them for an abuse of discretion. *Dennis Garbert & Assoc., Inc. v. Pack-Tech Int'l Corp.*, 115 F.3d 767, 771 (10th Cir. 1997). In this case, the district court did not deny or postpone the motions to dismiss, but rather, treated them as motions for summary judgment under Fed. R. Civ. P. 12(c). We believe a summary judgment motion, seeking to dispose of all the issues of a case, is an effort to "otherwise defend," and as such, is sufficient to prevent default judgment. *See Rashidi v. Albright*, 818 F. Supp. 1354, 1355-56 (D.Nev. 1993), *aff'd*, No. 93-15623, 1994 WL 594637 (9th Cir., Oct. 31, 1994) (unpublished opinion). Our determination is strengthened here by the fact the summary judgment motions in this case actually initiated from motions to dismiss, showing a continuation of an initial affirmative action by the tobacco companies to defend themselves against the complaint. Moreover, default judgment is a harsh sanction, and instead, we strongly favor resolution of a dispute on the merits. *Ruplinger v. Rains (In re Rains)*, 946 F.2d 731, 732 (10th Cir. 1991) (quotation marks and citations omitted). In fact, default judgment is normally viewed as only available when the adversary process is halted because of an unresponsive party. *Id.* In this case, the tobacco companies actively litigated their defense,

without unresponsive tactics or delays.

We also reject Mr. Hise's and Mr. Isch's suggestion default judgment must be entered against the tobacco companies because their summary judgment motions did not provide a concise statement of numbered facts as required under Fed. R. Civ. P. 56 or contain affidavits supporting their motions. Instead, the motions to dismiss filed by the tobacco companies set forth facts that are undisputed by Mr. Hise and Mr. Isch and based almost exclusively on the settlement agreement, attached to their motions. Thus, no affidavit in this instance was necessary. Likewise, the fact the tobacco companies did not number their short, one-page version of facts, or reiterate them in their supplemental submission, does not provide sufficient reason in this case to enter a default judgment or require an order compelling them to amend their motions. Under these circumstances, we hold the district court did not abuse its discretion in denying the motion for default judgment against the tobacco companies.

3. Summary judgment

In cases involving summary judgment conversions, as in other summary judgment cases, we review *de novo* the granting of summary judgment, applying the same legal standard the district court used. *See United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1003 (10th Cir. 1996) *see also Hise*, 46 F.Supp.2d at 1204 (articlating summary judgment legal standard). Applying this

standard, and on review of the record, we must agree with the district court that summary judgment should be granted in favor of the tobacco companies. Because the district court issued a well-reasoned decision, thoroughly explaining the reasons for granting summary judgment, *Hise*, 46 F.Supp. at 1205-10, we decline to duplicate its analysis here.

D. Conclusion

For the reasons contained herein, and for substantially the same reasons articulated in the district court's April 29, 1999 decision, we AFFIRM summary judgment in favor of the Appellee tobacco companies.

Entered by the Court:

WADE BROBBY

United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LEO HISE and JACK ISCH, both individually and as representative of a class of others similarly situated,
Plaintiffs - Appellants.
v

PHILLIP MORRIS INCORPORATED, a Virginia Corporation; R. J. REYNOLDS TOBACCO COMPANY, a New Jersey Corporation; BROWN & WILLIAMSON, a Delaware Corporation; LORILLARD TOBACCO COMPANY, a Delaware Corporation; LIGGETT GROUP INC., sued as: The Liggett Group, a Delaware Corporation d/b/a Liggett and Myers Tobacco Company,
Defendants - Appellees.

No. 99-5113

A.D. BEDELL WHOLESALE COMPANY, INC.,
Amicus Curiae.

ORDER
Filed March 23, 2000

Before BRORBY, KELLY and MURPHY, Circuit Judges

Appellant's petition for rehearing denied.

The petition for rehearing en banc was transmitted to all the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court
by: S/ Opal A Carter
Deputy Clerk

Federal Rules of Civil Procedure, Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

a) When Presented.

1) Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer.

(A) within 20 days after being served with the summons and complaint, or

(B) if service of the summons has been timely waived on request under Rule 4(d) , within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(2) A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.

(3) The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60

days after the service upon the United States attorney of the pleading in which the claim is asserted.

(4) Unless a different time is fixed by court order, the service of a motion permitted under this rule alters the periods of time as follows:

(A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented.

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 . A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or

motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 , and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56 .

(c) Motion for Judgment on the Pleadings.

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 , and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56 .

(d) Preliminary Hearings.

The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of

any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion For More Definite Statement.

If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion To Strike.

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion

A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any

defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defense

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19 , and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a) , or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Federal Rules of Civil Procedure, Rule 56
Summary Judgement.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the

issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest

upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

No. 00-337

Supreme Court, U.S.
FILED
SEP 28 2000
CLERK

IN THE

# Supreme Court of the United States

LEO HISE and JACK ISCH, individually and as representatives of a class of others similarly situated,

*Petitioners*,

—v.—

PHILIP MORRIS INCORPORATED (a Virginia corporation), R.J. REYNOLDS TOBACCO COMPANY (a New Jersey corporation), BROWN & WILLIAMSON TOBACCO CORPORATION (a Delaware corporation), and THE LIGGETT GROUP D/B/A LIGGETT AND MYERS TOBACCO COMPANY (a Delaware Corporation),

*Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1) Whether *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) bars a claim for antitrust damages brought by a putative class of consumers against manufacturers whose products are available for sale only through third-party distributors and retailers.

2) Whether a defendant's conduct in negotiating and executing an agreement to settle lawsuits brought by state officials is protected from antitrust liability by the *Noerr-Pennington* doctrine.

3) Whether a multi-state litigation settlement among a group of private defendants and forty-six states, the District of Columbia and five United States territories can constitute an unconstitutional interstate compact under Article I, Section 10 of the United States Constitution, and whether such an argument may be raised in this Court when it was not alleged in the complaint.

4) Whether a district court may grant summary judgment for the defendants after assuming all facts alleged in the complaint to be true and undisputed, converting a motion pursuant to Federal Rule of Civil Procedure 12(b)(6) into one for summary judgment under Federal Rule of Civil Procedure 56 and providing both sides the opportunity to file supplemental evidence in support of and in opposition to the motion.

## LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

All parties to the proceeding in the Tenth Circuit are listed in the caption on the cover of this Brief in Opposition. Pursuant to Supreme Court Rule 29.6, Respondents identify the following parent corporations and publicly held corporations owning 10 percent or more of Respondents' stock:

Philip Morris Incorporated:
Philip Morris Companies, Inc.

R.J. Reynolds Tobacco Company:
R.J. Reynolds Tobacco Holdings, Inc.

Brown & Williamson Tobacco Corporation:
BATUS Tobacco Services, Inc.
BATIC, Inc.
BATUS Holdings, Inc.
Louisville Securities, Ltd.
British-American Tobacco (Holdings), Ltd.
BAT Industries, p.l.c.
British American Tobacco (1998), Ltd.
British American Tobacco, p.l.c.

Lorillard Tobacco Company:
Loews Corporation
Lorillard, Inc.

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## Opinions Below

The opinion of the United States District Court for the Northern District of Oklahoma is reported at 46 F. Supp. 2d 1201, and is reproduced in the Appendix ("App.") to the petition for writ of certiorari filed by Petitioners, at page 1. The opinion of the United States Court of Appeals for the Tenth Circuit is unreported and is reproduced at App. 20.

## Statement of Jurisdiction

The court of appeals entered its judgment on February 17, 2000. A timely petition for a writ of certiorari was filed in this Court. This Court has jurisdiction to review the petition under 28 U.S.C. § 1254(1).

## Statutory Provisions and Rules Involved

The relevant statutes and rules are fully set forth in the petition for writ of certiorari. For the reasons stated below, Respondents contend that neither the Interstate Compact Clause of Article I, Section 10 of the Constitution nor Article IV, Section 4 of the Constitution, are properly before this Court, because Petitioners' complaint did not allege a violation of either provision.

## Statement Of The Case

In 1998, the Respondent manufacturers of tobacco products entered into a Master Settlement Agreement ("MSA") with forty-six states, the District of Columbia, and five United States territories to resolve dozens of lawsuits that had been brought against Respondents by state and territorial governments throughout the United States. This case is one of several subsequent lawsuits challenging the MSA on antitrust and constitutional grounds. To date, every court to consider such a challenge to the MSA has concluded that these lawsuits have no merit. The opinions of the district court and the Tenth Circuit are fully in accord with this Court's precedent and with the rulings of every other court to consider similar challenges to the MSA.

1. *Factual Background.* In November 1998, Respondents entered into the MSA with 52 jurisdictions that had commenced lawsuits against defendants seeking monetary, equitable and injunctive relief (the "State Lawsuits"). The MSA represents a comprehensive and final settlement of the State Lawsuits. The MSA required the settling states to dismiss, with prejudice, certain claims against Respondents. In exchange, the MSA required Respondents, *inter alia,* to fund a program of public

education, and to make payments—totaling more than $200 billion—to the settling states and territories. The MSA set forth detailed formulas and instructions governing the timing and amounts of such payments. The MSA provided that its implementation would be coordinated and overseen by the National Association of Attorneys General ("NAAG") and that the court to which the MSA was presented for approval would retain exclusive jurisdiction for enforcement purposes.

On November 23, 1998, the Oklahoma Attorney General executed the MSA. On December 1, 1998, the Oklahoma District Court for Cleveland County entered a Consent Decree and Final Judgment in Case No. CJ-96-1499-L(H) (the "Oklahoma Action"). In approving the Consent Decree, the court found that entering into the MSA "is in the best interests of the State of Oklahoma." Pursuant to the Consent Decree and MSA, the District Court for Cleveland County, on December 1, 1998, entered an agreed order dismissing the Oklahoma Action with prejudice.

2. *Proceedings In The Trial Court.* Petitioners' complaint was filed on December 15, 1998. The district court had jurisdiction pursuant to 28 U.S.C. § 1331. Petitioners' complaint alleged that defendants raised the prices of their tobacco products in order to pay the costs associated with the MSA. The complaint specifically alleged three counts. The First Count alleged that Respondents' price increases constituted unlawful price fixing in violation of the Sherman Act, 15 U.S.C. § 1. The Second Count alleged that Respondents' conduct in passing on to consumers the costs of complying with the MSA deprived Petitioners and other consumers of a property interest without due process of law in violation of the Fourteenth Amendment. The Third Count alleged that, by entering into the MSA, Respondents "presumed to assume regulations and governance of the manufacture, interstate trade and consumption of tobacco

products," but failed to identify the law or constitutional provision alleged to have been violated.

Respondents filed a timely motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). On March 17, 1999, the district court issued an order converting the motion to dismiss under Rule 12(b)(6) into a motion for summary judgment under Rule 56. *Hise v. Philip Morris, Inc.*, 46 F. Supp. 2d 1201, 1204 (N.D. Okla. 1999); at 1204, App. 3, 23. The district court's order provided that Respondents would have 15 days to file any supplemental materials in support of their motion, and that Petitioners would have 15 days thereafter to file any supplemental materials in opposition to the motion. *Id.*

Respondents submitted a short supplemental memorandum which argued that summary judgment was appropriate due to Petitioners' failure to allege facts sufficient to state a claim under any of their theories and the absence of evidence to support any of their claims. App. 3. Petitioners also submitted a supplemental memorandum, but the only evidence they offered in opposition to summary judgment was a portion of a statement from a tobacco industry website concerning the 1997 Proposed Resolution of the States' tobacco lawsuits—a proposal which ultimately failed to receive Congressional approval, and which had nothing to do with the MSA. Petitioners did not file an affidavit pursuant to Federal Rule of Civil Procedure 56(f) identifying any discovery they believed necessary to enable them to oppose summary judgment. Indeed, even after the court had converted the motion to dismiss into a motion for summary judgment, Petitioners expressly agreed, in the parties' Joint Case Management Conference Statement, to stay all discovery pending the court's disposition of the summary judgment motion.

On April 29, 1999, the district court granted summary judgment in Respondents' favor. The court held that Petitioners' antitrust claim failed because "defendants' activities, in negotiating the M.S.A. with the several settling states and achieving a settlement agreement with those states, are protected under the *Noerr-Pennington* doctrine as conduct incidental to litigation." *Hise*, 46 F. Supp. 2d at 1206 (citation omitted); App. 9. The district court also concluded that, to the extent Petitioners' antitrust claim sought damages on behalf of consumers of tobacco products, that claim was barred by the "indirect purchaser" rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). *Hise*, 46 F. Supp. 2d at 1207; App. 12-13.

The district court also granted summary judgment with respect to Petitioners' constitutional claims. The court held that Petitioners' due process claim failed as a matter of law because consumers have "no recognized property interest in paying a certain sum to a retailer to purchase a tobacco product." *Id.* at 1209; App. 17. As to the Third Count—which Petitioners contended in their brief in opposition to the motion to dismiss was based on Article I, Section 10 of the Constitution—the court found that Petitioners' claim was "plainly frivolous" and unsupported by authority. *Id.* at 1209-10; App. 18-19.

3. *Proceedings In The Court Of Appeals.* In an unpublished opinion, the United States Court of Appeals for the Tenth Circuit affirmed. With respect to the issues of whether Petitioners' antitrust claims were barred by *Illinois Brick* and *Noerr-Pennington* and whether summary judgment should have been granted on the purported claim under Article I, Section 10 of the Constitution, the Tenth Circuit

adopted the district court's opinion in its entirety.[1] The court stated that "[b]ecause the district court issued a well-reasoned decision, thoroughly explaining the reasons for granting summary judgment, . . . we decline to duplicate its analysis here." App. 30. The court of appeals also rejected Petitioners' argument that it was inappropriate for the district court to grant summary judgment rather than offering them an opportunity to amend the complaint. App. 27. Petitioners sought review before the court *en banc*. On March 23, 2000, Petitioners' request for rehearing *en banc* was denied. App. 32.

**Reasons For Denying The Writ**

The rulings below are consistent with this Court's precedents and raise no issue warranting further review. With respect to Petitioner's antitrust and constitutional challenges to the MSA, there is no conflict of authority requiring resolution by this Court. Every court to consider similar challenges to the MSA has concluded that such challenges have no merit. Similarly, the procedural issues raised by Petitioners involve no conflict of authority and present no important issue of federal law that requires resolution by this Court.

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[1] Petitioners did not challenge on appeal the district court's grant of summary judgment with respect to their due process claim.

## I. The Opinions Below Are Fully Consistent With This Court's Precedent And With The Decisions Of Other Courts of Appeals.

### A. The Tenth Circuit Properly Held That *Illinois Brick* Bars Antitrust Claims Brought By Indirect Purchasers of Tobacco Products.

In the proceedings below, Petitioners alleged that defendants conspired to raise the prices of their tobacco products in order to pay the costs of the MSA. Both the district court and the Tenth Circuit concluded that, to the extent it seeks damages, Petitioners' antitrust claim is barred as a matter of law by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

Recognizing the difficulties in apportioning recovery among direct and indirect purchasers, this Court in *Illinois Brick* held that only *direct purchasers* of a product have standing to recover damages in a federal antitrust action. *Id.* at 745-46.[2] Under *Illinois Brick* and its progeny, indirect

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[2] This Court there observed,

> Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity

purchasers of the product of an alleged antitrust violator cannot recover for overcharges allegedly imposed on a wholesaler or other direct purchaser. This is true even if the direct purchaser passed on to a subsequent purchaser all or part of the illegally inflated price. *Id.* at 730-31.

Petitioners did not allege that they or the class of persons they purported to represent purchased tobacco products directly from defendants. They alleged only that they are "consumers" of tobacco products. (Pet. at 11; *Hise*, 46 F. Supp. 2d at 1203; App. 1-2, 22). Consumers do not purchase tobacco products directly from Respondents. They may only do so through distributors and retailers. These intermediaries may choose whether or not to pass on all or a portion of the increased price to consumers. Thus, this case presents precisely the complex problems of allocation that led to the decision in *Illinois Brick*.

Here, as in the courts below, Petitioners assert that they are entitled to an exception to the *Illinois Brick* rule because this case involves an alleged "excise" or "tax" which is passed on to consumers in the form of higher prices. Pet. at 12-13. They also contend that they were directly "targeted" by Respondents and the state attorneys general to pay the MSA's costs. Pet. at 16. Even accepting, *arguendo*, these incorrect characterizations of the MSA, this Court's decision in *Kansas v. Utilicorp United Inc.*, 497 U.S. 199 (1990), makes clear that Petitioners are not entitled to such an exception.

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to treble-damages suits and seriously undermine their effectiveness

*Illinois Brick*, 431 U.S. at 737.

In *Utilicorp*, two states, acting in a *parens patriae* capacity on behalf of residential consumers who purchased natural gas from public utilities, filed suit against natural gas producers in connection with an alleged antitrust conspiracy to inflate natural gas prices. This Court held that *Illinois Brick* precluded the states from suing on behalf of consumers of natural gas, who did not purchase gas directly from the defendants, but only indirectly through the utility companies.

Like Petitioners here, the plaintiffs in *Utilicorp* argued that *Illinois Brick* should not apply because the case involved "regulated public utilities that pass on 100 percent of their costs to their customers." *Utilicorp*, 497 U.S. at 208. This Court rejected the argument that such a case would eliminate the problems of apportionment and multiple liability that *Illinois Brick* sought to remedy, and also cautioned that the creation of new exceptions to *Illinois Brick* is strongly disfavored. *Id.* at 216. Thus, this Court has squarely rejected the argument now urged by Petitioners—that a 100 percent pass-through of increased costs should entitle consumers to an exception to the indirect purchaser rule.

The Tenth Circuit's decision that *Illinois Brick* bars an action for antitrust damages brought by consumers who did not purchase products directly from the defendant is also consistent with the decisions of every United States court of appeals to consider the issue.[3]

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[3] *See, e.g., See SAS of Puerto Rico v. Puerto Rico Telephone Co.*, 48 F.3d 39, 43 (1st Cir. 1995) (citing indirect purchaser rule as one example of court-created limits on antitrust standing); *McCarthy v. Recordex Service, Inc*, 80 F.3d 842, 844 (3d Cir. 1996) (holding that plaintiffs "lack standing to bring a treble damages claim because they are not 'direct purchasers' as required by *Illinois Brick Co.*"); *Laurel Sand & Gravel v. CSX Transportation*, 924 F.2d 539 (4th Cir.

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1991) (indirect purchaser rule barred sand and gravel distributor from seeking damages from railroad); *Free v. Abbott Laboratories*, 176 F.3d 298 (5th Cir. 1999) (in interpreting Louisiana antitrust statutes, court noted that indirect purchasers are barred from bringing suits for damages under federal law); *County of Oakland v. City of Detroit*, 866 F.2d 839 (6th Cir. 1987) (under the indirect purchaser rule, county which purchased sewage services from the city and resold them to consumers was the proper party to bring antitrust action); *In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d 781 (7th Cir. 1999) (indirect purchaser rule barred retail pharmacies from seeking damages from drug manufacturers); *Campos v. Ticketmaster*, 140 F.3d 1166 (8th Cir. 1998) (indirect purchaser rule barred buyers of concert tickets from bringing antitrust action against supplier of ticket distribution services); *Lucas v. Automotive Engineering, Inc*, 140 F.3d 1228, 1234 (9th Cir. 1998) (holding that a plaintiff who had purchased tires from a distributor who in turn purchased the tires from defendant lacked standing under *Illinois Brick*); *Sports Racing Servs., Inc. v. Sports Car Club,* 131 F.3d 874, 883 (10th Cir. 1997) ("The Supreme Court has consistently held that only direct purchasers suffer injury within the meaning of § 4 of the Clayton Act."); *Lowell v. American Cyanamid Co.*, 177 F.3d 1228 (11th Cir. 1999) (*Illinois Brick* denies standing to indirect purchasers, but was inapplicable to vertical price-fixing conspiracy); *Adams v. Pan American World Airways*, 828 F.2d 24, 28 (D.C. Cir. 1987) (*Illinois Brick* "flatly precludes indirect purchasers from bringing antitrust actions in virtually all cases."); *see also In re NASDAQ Market Makers Antitrust Litigation*, 169 F.R.D. 493, 505 (S.D.N.Y. 1996) (citing "bright line rule" against standing for indirect purchasers).

The Third and Ninth Circuit cases relied on by Petitioners are not in conflict with the Tenth Circuit's decision here. Contrary to Petitioners' description, the Third Circuit's decision in *In re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144 (3d Cir. 1993), did not create an exception to *Illinois Brick*. Rather, the *Lake Erie* court concluded that the plaintiffs in that case had standing to sue under *Illinois Brick*. In *Lake Erie*, the plaintiff steel manufacturers challenged the defendant railroads' alleged conspiracy to delay the implementation of self-unloading technology and otherwise monopolize the transportation of iron ore along lower Lake Erie. The court concluded that the injury to the steel companies—*who were direct customers of the railroads*—was sufficient to satisfy *Illinois Brick*, even though some of the damages the plaintiffs sought to recover consisted of amounts paid to parties other than the railroads as a result of plaintiffs' attempt to avoid the effects of the railroads' attempted monopolization. The *Lake Erie* court expressly cautioned, however, that *Illinois Brick* would bar a suit "by a 'downstream' industry alleging, as was alleged in *Illinois Brick*, that the steel companies had passed on the transportation increase in the price of steel." *Lake Erie*, 998 F.2d at 1169.[4] That is exactly Petitioners' situation. Petitioners are downstream purchasers who complain that defendants passed on the costs of the MSA in the price of

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[4] Indeed, after *Lake Erie*, the Third Circuit applied *Illinois Brick* to preclude antitrust claims brought by indirect purchasers. *See McCarthy v. Recordex Service, Inc*, 80 F.3d 842, 844 (3d Cir. 1996); *see also Kleissler v. US Forest Service*, 157 F.3d 964, 979 (3d Cir. 1998) (citing *Illinois Brick* as preventing "massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant").

tobacco products, which were sold to them via distributors and retailers.

The other case on which Petitioners rely, *Amarel v. Connell,* 102 F.3d 1494 (9th Cir. 1997), simply has nothing to do with *Illinois Brick.* Plaintiffs in that case were competitors, not customers, of the defendants. Thus, the indirect purchaser rule was not at issue. The *Amarel* court did not even discuss, much less create an exception to, *Illinois Brick.*

In sum, there is no merit to Petitioners' suggestion that this is a case of "absolute first impression." Pet. at 17. The Tenth Circuit's decision represents a straightforward application of *Illinois Brick* and *Utilicorp* and is consistent with the decisions of every court of appeals to consider similar claims by indirect purchasers.[5]

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[5] Petitioners correctly note that *Illinois Brick* applies only to their claim for damages, not their claim for injunctive relief. However, the district court correctly held that Petitioners' injunctive relief claim was inadequately pled, and in any event, as argued below, the *Noerr-Pennington* doctrine insulates Respondents from liability on both the injunctive relief claim and the damages claim. *Hise*, 46 F. Supp. 2d at 1206-07, 1208; App. 8-11, 14.

### B. The Tenth Circuit Correctly Concluded That The *Noerr-Pennington* Doctrine Protects Respondents From Liability Arising Out Of Their Negotiation And Execution Of The MSA.

Grounded in the First Amendment, the *Noerr-Pennington* doctrine allows individuals or businesses to petition the government, free from antitrust liability, regardless of any anticompetitive motive or effect. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135-36 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669-72 (1965). In *Noerr*, this Court held that Sherman Act liability cannot attach to efforts to associate together to petition the government, regardless of any anticompetitive motivation or effect of such petitioning efforts. *Noerr*, 365 U.S. at 139. This Court reaffirmed the importance of *Noerr*'s First Amendment protection a few years later, stating,

> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.

*California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972).

The courts below properly held that, to the extent Petitioners allege Respondents violated federal antitrust laws by entering into the MSA, their claim fails as a matter of law

under *Noerr-Pennington.* This is true for at least two independent reasons. *First,* Respondents' negotiation and execution of the MSA are protected as efforts to utilize the courts as a means to protect their economic interests. *Second,* Respondents' actions in entering into the MSA fall within the immunity provided for negotiations and the resulting contract with governmental officials.

1. The right of petition accorded immunity under *Noerr-Pennington* has been applied to efforts to petition all three branches of government, including the judiciary. *California Motor,* 404 U.S. at 510 ("The right of access to the courts is indeed but one aspect of the right of petition."). Every court of appeals to consider the question has held that *Noerr-Pennington* immunity applies to the defense of legal proceedings, including the joint defense of a lawsuit.[6] Similarly, courts of appeals have consistently held that the decision to accept or reject an offer of settlement is protected as conduct incidental to litigation, and therefore cannot give rise to antitrust liability. *See Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1528 (9th Cir. 1991) (the decision whether to settle "is conduct incidental to the prosecution of the suit and not a separate and distinct activity which might form the basis for an antitrust liability"); *Campbell v. City of Chicago,* 823 F.2d 1182, 1186 (7th Cir. 1987) (settlement with local government

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[6] *Mir v. Little Co. of Mary Hosp.,* 844 F.2d 646, 649 (9th Cir. 1988); *In re Burlington Northern, Inc.*, 822 F.2d 518, 526 (5th Cir. 1987); *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 272 (7th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985); *see also Lemelson v. Bendix Corp.,* 104 F.R.D. 13, 18 (D. Del. 1984); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1155-57 (E.D. Pa. 1981), *rev'd on other grounds, sub nom. In Re Japanese Elec. Prods.*, 723 F.2d 238 (3d Cir. 1983).

entitled to *Noerr* immunity); *cf. Coastal States Marketing v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983) ("Given that petitioning immunity protects joint litigation, it would be absurd to hold that it does not protect those acts reasonably and normally attendant upon effective litigation.").[7]

The courts below correctly concluded that the *Noerr-Pennington* doctrine provides immunity for Respondents' negotiation and execution of the MSA. Respondents were sued in over forty lawsuits, in which the states and territories sought both damages and equitable relief. To compromise these lawsuits, Respondents entered into the MSA. The MSA was approved by courts in numerous jurisdictions, including Oklahoma. The MSA thus represents both the result of defendants' joint defense of the State lawsuits and, once approved, the product of defendants' petitioning of the states and the judiciary.

2. *Noerr-Pennington* also provides immunity for negotiations and agreements between private parties and the government. The negotiations are protected as efforts to petition the government. *Greenwood Utils. Comm'n. v. Mississippi Power Co.*, 751 F.2d 1484, 1499 (5th Cir. 1985) (efforts to convince government to adopt marketing policy are protected under *Noerr-Pennington*, "for it is such petitioning activity by interested individuals that provides the

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[7] *See also Modesto Irrigation Dist. v. Pacific Gas & Electric Co.*, 61 F. Supp. 2d 1058, 1072 (N.D. Cal. 1999) (holding that acceptance or rejection of settlement offer is protected by *Noerr-Pennington* immunity); *Johnson v. Con-Vey/Keystone Inc.*, 856 F. Supp. 1443, 1448 (D. Or. 1994) (stating that "a decision to accept or reject a settlement offer is conduct incidental to the prosecution of the lawsuit" and that conduct incidental to a suit is protected by *Noerr-Pennington*).

flow of information essential to the proper functioning of our democratic institutions"); *Independent Taxicab Drivers v. Greater Houston Transp. Co.*, 760 F.2d 607, 612-13 (5th Cir. 1985) (applying *Noerr* to "arm's length contractual negotiations" between business entities and public officials); *Budget Rent-A-Car, Inc. v. Hertz Corp.*, 693 F.2d 84, 88 (9th Cir. 1982) (*Noerr* protects rental-car company's efforts to persuade directors of state-operated airport to lease space only to rental-car companies that satisfied myriad restrictive requirements). The contract resulting from such negotiations is similarly entitled to immunity. *Greenwood Utils.*, 751 F.2d at 1505 ("First Amendment petitioning privileges would indeed be hollow if upon achieving a petitioned-for end the petitioner were then subjected to antitrust liability for his success.").

The MSA was a compromise agreement reached between defendants and 52 jurisdictions that were prosecuting lawsuits against defendants. As a result, both defendants' negotiations with the plaintiff states and the resulting contract with those states—the MSA—fall squarely within the protection provided by *Noerr-Pennington.*

Petitioners contend that the courts below erred in applying *Noerr-Pennington* because the State attorneys general supposedly were acting outside the scope of their authority in negotiating the MSA on behalf of the States. *See* Pet. at 18. Petitioners cite no authority in support of this assertion. Apparently, this argument is premised on Petitioners' theory—also unsupported by citation to relevant case law—that the sums paid under the MSA constitute an unlawful "excise" or "tax," which the state attorneys general had no authority to impose. There is no merit to this argument.

The sums to be paid by Respondents pursuant to the MSA are in compromise of claims for *damages*. As the

district court rightly concluded, the *Noerr-Pennington* doctrine "would surely ring hollow if it failed to encompass private entities who, having been sued by one or more states for similar conduct, jointly petition the states in order to achieve a mutually acceptable settlement, designed to reduce the amount of time and expense involved in defending the action." *Hise,* 46 F. Supp. 2d at 1206; App. 9-10.[8] The decision below is in accord with the decisions of other federal courts on this point, and review by this Court is therefore unnecessary.

### C. Petitioners Did Not Allege That The MSA Constitutes An Unlawful "Interstate Compact," And In Any Event, There Is No Merit To The Argument.

Petitioners assert that this Court should grant the writ because "the Master Settlement Agreement must fail as an illegal interstate compact prohibited by the United States Constitution, Art. I, § 10...." Pet. at 20. As an initial matter, this argument fails because Petitioners' complaint did not

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[8] Petitioners raise for the first time in this Court the argument that the MSA somehow usurps the state legislatures' power to raise taxes, which allegedly constitutes a violation of Article IV, Section 4 of the Constitution. Pet. at 20. Not only does this claim rest on assertions about the authority of the various attorneys general and state legislations for which there is no evidence in the record, but it was neither raised in nor ruled on by the courts below, and therefore this Court should not consider it. *See, e.g., Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999).

even allege that the MSA is an unconstitutional "interstate compact." This Court ordinarily does not consider issues that were not properly raised. *See, e.g., Demarest v. Manspeaker*, 498 U.S. 184, 188-89 (1991).[9]

Even if the Court were to consider Petitioners' Compact Clause argument, it has no merit. Petitioners contend that the MSA constitutes "an intrusion upon the sovereignty of the 'non-settling states' and the supremacy of Congress in matters of interstate commerce." Pet. at 22. This argument is frivolous. There is no precedent that supports Petitioners' contention that a multi-state litigation settlement agreement between several individual states, on the one hand, and a group of private defendants, on the other, constitutes an illegal "interstate compact" among the settling states.

This Court has held that the Compact Clause does not prohibit all agreements or contracts among states, but rather was designed to prevent the formation of "confederations of states to the detriment of the welfare of the Union as a

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[9] The Complaint did not contain any allegation that Respondents had violated Article I, Section 10 of the Constitution. This argument was made for the first time in Petitioners' briefs before the district court. Specifically, they argued that by entering into the MSA with the states, Respondents entered into an unlawful "confederation" in violation of Article I, Section 10, which provides that "[n]o State shall enter into any Treaty, Alliance, or Confederation." Apparently, their theory was that by entering into the MSA, Respondents, along with the state attorneys general, sought to bypass the State legislatures and Congress and establish an outlaw government or "Confederation" within the territory of the United States. The district court properly rejected this argument as "plainly frivolous." *Hise*, 46 F. Supp. 2d at 1210; App. 18-19.

whole." *Northeast Bancorp, Inc. v. Board of Gov. of Fed. Res. Sys.*, 472 U.S. 159, 174-75 (1985). Prior decisions have made it abundantly clear that the Compact Clause has no application to agreements such as the MSA, which do not purport to confer on the states any additional powers beyond those they already possess.

In *United States Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452, 473 (1978), this Court held that a multistate compact does not violate the Compact Clause when it "does not purport to authorize member States to exercise any powers they could not exercise in its absence." *United States Steel* controls the outcome here. Because each settling state plainly could have entered into its own, separate settlement agreement with the tobacco manufacturers, the settling states did not exercise any powers in entering the MSA that they could not exercise independently. *See PTI, Inc. v. Philip Morris Incorporated*, 100 F. Supp. 2d 1179, 1198 (C.D. Cal. 2000) ("The fact that the states acted collectively to settle their disputes with the participating manufacturers . . . does not create a violation of the Interstate Compact Clause."). Thus, even if the Compact Clause issue were properly before this Court, the decisions below are fully consistent with this Court's Compact Clause precedents.

### D. The District Court's Summary Judgment Procedures Were Entirely Proper, Raise No Conflict Of Authority, And Present No Important Federal Question.

Petitioners object to the summary judgment procedure adopted by the district court. Pet. at 23-26. They contend this Court should grant a writ of certiorari because Respondents' summary judgment motion did not contain a

section of separately numbered undisputed facts, as required by the local rules of the United States District Court for the Northern District of Oklahoma. As the Tenth Circuit expressly held, App. 27, there was nothing improper about the district court's summary judgment procedure in this case, and nothing about that procedure warrants further review by this Court.

Under *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), a district court has power to enter summary judgment on its own motion "so long as the losing party was on notice that she had to come forward with all of her evidence." *Id.* at 326 (citations omitted). In this case, the district court provided such notice. Pursuant to Fed. R. Civ. P. 12(b), the court issued an order informing the parties of its intention to convert Respondents' Rule 12(b)(6) motion to dismiss into a motion for summary judgment and inviting the parties to submit any relevant evidence or other materials in support of or opposition to the motion.

In response to the district court's order, Respondents filed a supplemental submission stating that, even if treated as a Rule 56 motion for summary judgment, their motion to dismiss should still be granted because Petitioners' claims fail assuming the facts alleged in the complaint to be true. Thus, Respondents' motion was based solely on the facts alleged in the complaint and the provisions of the MSA, which had been attached to their original motion to dismiss with a request for judicial notice.

It is immaterial that these undisputed facts were not separately identified in numbered paragraphs. Respondents' initial motion to dismiss and their supplemental submission clearly identified the undisputed facts on which the motion was based. This was more than sufficient to meet Respondents' summary judgment burden of "'showing' — that is, pointing out to the district court — that there is an

absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325.[10]

Petitioners were given an opportunity to submit evidence in opposition to the motion, or alternatively, to file an affidavit under Federal Rule of Civil Procedure 56(f) identifying any further discovery that they believed necessary to oppose the motion. They did neither. Instead, Petitioners filed a supplemental submission containing as their sole "evidence" in opposition to summary judgment a portion of a statement from a tobacco industry website concerning the 1997 Proposed Resolution of the tobacco litigation which failed to receive Congressional approval.

On this record, Petitioners have no legitimate basis to complain that the district court's summary judgment procedures were improper. Moreover, the Tenth Circuit's decision that summary judgment was appropriately granted based solely on the MSA and the facts alleged in the complaint raises no conflict of authority and presents no important federal issue requiring review in this Court.

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[10] Because Petitioners bore the burden of proof on all elements of their claims, Respondents were not obligated to present any affidavits or other evidence in support of their motion. As this Court held in *Celotex*:

> [W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule,"

*Celotex*, 477 U.S. at 324.

## II. Consistent With The Courts Below, Every Court To Consider Antitrust And Constitutional Challenges To The MSA Has Concluded That Such Challenges Lack Merit.

As shown above, the Tenth Circuit's rulings in this case present no conflict with the decision of any federal court of appeals. Respondents further note that the decisions of the district court and the court of appeals in this case are consistent with every other court in the nation to consider antitrust and constitutional challenges to the MSA. To date, the courts have uniformly held that such challenges lack merit.

In *PTI, Inc. v. Philip Morris Incorporated,* 100 F. Supp. 2d 1179 (C.D. Cal. 2000), the district court dismissed antitrust and constitutional challenges to the MSA brought by plaintiffs in the business of cigarette re-entry and importation. The court held that defendants' conduct in connection with the MSA was entitled to immunity under the *Noerr-Pennington* doctrine. *Id.* at 1192-95. The district court also expressly held that the State defendants did not violate the Interstate Compact Clause of the Constitution by entering into the MSA. *Id.* at 1197-98.

In *A.D. Bedell Wholesale Co., Inc. v. Philip Morris Incorporated,* 104 F. Supp. 2d 501 (W.D. Pa., 2000), the district court dismissed a Sherman Act challenge to the MSA brought by a wholesaler of tobacco products. In dismissing the antitrust claims, the court held that Respondents' conduct in negotiating and executing the MSA "fall[s] within the category of conduct protected by the *Noerr-Pennington* immunity doctrine." *Id.* at 507. The court also held that

antitrust claims based upon the MSA must be dismissed under the state action immunity doctrine of *Parker v. Brown*, 317 U.S. 341 (1943).[11]

In *Forces Action Project v. California*, No. C 99-0607 MJJ, 2000 WL 20977 (N.D. Cal. Jan. 5, 2000), the district court granted defendants' motion to dismiss a constitutional challenge to the MSA. The court held that the plaintiffs lacked standing to bring such claims under Article III of the Constitution. *Id.* at *4. The court further held that the *Noerr-Pennington* doctrine immunized defendants from liability for claims arising out of their negotiation and execution of the MSA. *Id.* at *8. Finally, the court denied plaintiffs' motion for leave to amend the complaint to allege an antitrust claim. Citing the district court's decision in this case, the court held that the relevant precedents "could not be clearer" that indirect purchasers lack standing to bring antitrust damages claims. *Id.* at *9.

In *Table Bluff Reservation v. Philip Morris Incorporated*, No. C 99-2621 MHP (N.D. Cal. Nov. 12, 1999), the district court granted defendants' motion to dismiss a challenge to the MSA brought by a group of American Indian tribes. The court held that the plaintiffs lacked standing, and specifically ruled that they had no standing to challenge the price increases enacted shortly after the MSA. Slip Op. at 9-10.

In sum, the Tenth Circuit's decision in this case is in harmony with every federal court to consider similar

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[11] The *Bedell* court permitted certain antitrust claims against defendant Philip Morris to proceed. These claims were based solely on the alleged conduct of Philip Morris in connection with its acquisition of certain cigarette brands from defendant Liggett, and had nothing to do with the MSA. *See Bedell*, 104 F. Supp. 2d at 508-10.

challenges to the 1998 Master Settlement Agreement. The federal courts have spoken with one voice on these issues, and there is no compelling need for this Court to exercise its supervisory function at this time. The writ should be denied.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

DATED: October 2, 2000

Respectfully submitted,

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and for this purpose only, signing on behalf of Respondents R. J. Reynolds Tobacco Company; Brown & Williamson Tobacco Corporation (individually and as successor by merger to the American Tobacco Company): and Lorillard Tobacco Company.

(3)

CASE NO. 00-337

Supreme Court, U.S.
FILED
OCT 2 2000
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

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**LEO HISE and JACK ISCH,** individually and as representatives of a class of others similarly situated,

*Petitioners*,

v.

**PHILIP MORRIS INCORPORATED** (a Virginia Corporation), **R. J. REYNOLDS TOBACCO COMPANY** (a New Jersey Corporation), **BROWN & WILLIAMSON TOBACCO CORPORATION** (a Delaware Corporation), **LORILLARD TOBACCO COMPANY** (a Delaware Corporation) and **THE LIGGETT GROUP d/b/a LIGGETT AND MYERS TOBACCO COMPANY** (a Delaware Corporation),

*Respondents*.

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**On Petition for a Writ of Certiorari To The United States Court of Appeals for the Tenth Circuit**

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# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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**CORPORATE DISCLOSURE STATEMENT FOR LIGGETT GROUP, INC.**

Liggett is an indirect subsidiary of Brooke Group Ltd., a company listed on the New York Stock Exchange.

## SUMMARY OF ARGUMENT

***Illinois Brick* "indirect purchaser" argument.** Under *Illinois Brick*, consumers, such as Plaintiffs, can not sue manufacturers for increased prices that are passed through to consumers through retailers or distributors. There is a recognized exception for "cost plus" contracts that force an automatic pass-through of increased prices to the consumer. Cigarette consumers, such as Plaintiffs, can not make use of this "cost plus" exception. The Defendants are tobacco manufacturers who sell their product through distributors and retailers. If Defendants raise the price for tobacco products, there is no automatic rise in the price of cigarettes to the consumer. The distributor or retailer may, or may not, raise the price of cigarettes in lock-step with the rise in tobacco costs. Allowing this action to proceed would defeat the purpose of the *Illinois Brick* rule.

***Noerr-Pennington* argument.** The *Noerr-Pennington* doctrine protects defendants from anti-trust actions based upon the defendant's actions in "petitioning" the government. The doctrine has its basis in the right to petition the government. There are three levels of "petitioning" that are present in this case. One, the subject settlement agreements arose out of the defendants' defense of the underlying action brought by the Attorneys General, and the defendants were "petitioning" the court to deny the States' claims. Two, the settlement agreements were consummated after the defendants "petitioned" the State Attorneys General Plaintiffs to settle the underlying case. Three, the settlement agreements were then presented to the courts of the various States, and each court confirmed the settlements by consent decree. Plaintiffs seek redress against these private Defendants because the Defendants participated in a successful attempt to procure a court order. This is a collateral attack on the underlying consent decrees, without joining the States that are on the "other side" of these consent decrees. In any event, Defendants had an objectively reasonable basis to believe that this settlement process was valid.

**"Illegal Compact" argument.** This novel Constitutional argument was not presented below, but was raised for the first time on appeal. In the trial court the Plaintiffs only argued that the settlement agreement constituted an illegal "confederacy" of the States under Art. 1, Sec. 10, cl. 1 of the United States Constitution. Now their argument is based upon Art. 1, Sec. 10, cl. 3, the "interstate compact" clause. The settlement agreements do not violate the interstate compact clause. These settlement agreements are, at their base, agreements between the States and the Defendants. They combine into one document what could have been agreed to separately. Otherwise, there would be no way that more than one State could enter into litigation, as there would be no way to "settle" the litigation by agreement, short of an Act of Congress.

**The "conversion to Summary Judgment" argument.** The Trial Court converted the Motions to Dismiss to Summary Judgments after giving both sides notice of the conversion, and giving each side certain time to file additional factual assertions to support their case. Plaintiff chose to file no factual assertions. Plaintiff complains because Defendants' facts were not "numbered." Numbering is not a requirement of Rule 56 and no numbers causes no prejudice. Plaintiff complains because Defendants' facts were "self-serving." If that is so, Plaintiff has not identified any such "fact" that caused them prejudice, and, as the trial court pointed out, most of Defendants' assertions were based upon the plain language of the settlement agreements.

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## ARGUMENT

**1. Response to Petitioner's Illinois Brick "indirect purchaser" argument. The Illinois Brick rule prohibits consumers, such as the Plaintiffs, from proceeding against manufacturers for increased costs that are passed on through distributors and retailers. Plaintiffs' proposed new "exception" should be rejected.**

Throughout this Brief, Petitioners may be referred to as "Plaintiffs," and Respondents may be referred to as "Defendants."

This Court, in *Illinois Brick Co. v Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), held that "indirect purchasers" (such as the ultimate consumer), could not bring antitrust damage actions against manufacturers for alleged price increases. Only the overcharged direct purchaser (such as the retailer who buys from the manufacturer) has standing to sue for such damages. Plaintiffs can not offensively use a "pass on" theory to show that a manufacturer's increased prices were passed on, through the distribution chain, to the indirect purchaser's damage. The primary rationale for this holding was that it would create a serious risk of multiple liability for defendants. If the indirect purchaser recovered part of the overcharge by asserting that part of it had been passed on to him, the direct purchaser could still recover the full amount of the overcharge, since the defendant would not be allowed to assert pass on as a defense. Further, the Court worried that tracing the complex economic adjustments in sales price, due to an increase in expenses at the manufacturing level, would complicate antitrust damage proceedings.

This Court admitted to two potential "exceptions" to the rule against suits by indirect purchasers. One exception, not applicable here, is the "owned or controlled by" exception. The second potential *Illinois Brick* exception is the "pre-existing cost-plus contract" exception. If the direct purchaser (for example, the retailer), is locked into a fixed quantity contract with the ultimate consumer, and the consumer must accept whatever price the retailer places on the product, and cannot purchase from other sources, or reduce his use of the product, then the exception may come into play. In that scenario, the direct purchaser simply "passes through" all of the loss to the consumer.

However, the "pre-existing cost-plus contract" exception must be narrowly construed. The *Illinois Brick* Court examined the strict limits of the exception:

> But this Court in Hanover Shoe [, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231] indicated the narrow scope it intended for any exception to its rule barring pass-on defenses by citing, as the only example of a situation where the defense might be permitted, a pre-existing cost-plus contract. In such a situation, the purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case. The competitive bidding process by which the concrete block involved in this case

was incorporated into masonry structures and then into entire buildings can hardly be said to circumvent complex market interactions as would a cost-plus contract.

*Illinois Brick* at 431 U.S. 735-36.

As this Court said, this exception is of "narrow scope." It has been outlined thusly:

> The cost-plus contract exception is thus a fragile principle grounded in law and economics. In essence, the exception involves three essential elements; first, that there exists an automatic pass on to the full extent of the overcharge to indirect purchasers; second, that the direct purchaser is insulated from any decrease in sales or profit; and third, that a contract exists which commits the indirect purchaser to buying a fixed quantity regardless of price. [citing cases] Thus, the cost-plus exception has been found to mean that the purchaser-seller's profit is guaranteed and controlled by a contract rather than by relatively unascertainable economic conditions. Under such circumstances, the overcharge must be passed-on automatically to the buyer with whom the purchaser-seller has his cost-plus contract and the quantity of sales and profits must remain constant despite the overcharge.
>
> *Lefrak v Arabian American Oil Co.*, 487 F.Supp. 808, 819 (E.D.N.Y. 1980), emphasis added.

The Petitioners try to fit within the same "pass-through" analysis. However, they fail to succeed on any of their points. We will take the points in turn, as they were numbered in *Lefrak*:

1. "[T]here exists an automatic pass on to the full extent of the overcharge to indirect purchasers." Although Petitioners want to assure the Court that cigarette distributors and retailers will automatically pass on all of the price increases assumed from the tobacco companies, there is nothing "automatic" about it. Under a cost-plus contract, the price pass-through is mechanical and automatic. However, a cigarette distributor or retailer can chose to pass on some, none, or all of its extra expenses to its customers.

2. "[T]hat the direct purchaser is insulated from any decrease in sales or profit." Cigarette distributors are not insulated from any decrease in sales or profit as a result of the price increase. If the cigarette distributors were under "cost-plus" contracts, they would have a legal mechanism to ensure that they would sell just as many cigarettes after the price hike as they did before, with a guaranteed profit for each pack. Plaintiffs can show no such arrangement between cigarette distributors and consumers. Consumers are free to cut down on the number of packs they purchase as the price goes up. Further, since the cost increase of tobacco does not necessarily "pass-through" to the consumer, the amount of profit per cigarette can change based on supply and demand. The distributor is still exposed to the possibilities that both the number of cigarettes sold, and the profit per cigarette, may have to change in response to consumer response.

3. "[T]hat a contract exists which commits the indirect purchaser to buying a fixed quantity regardless of price." Of course, no such contract exists. American consumers are not contractually bound to buy a fixed number of cigarettes, regardless of price.

Allowing the case at bar to escape the *Illinois Brick* wall would defeat the very purposes of the *Illinois Brick* case. The manufacturers, if they were guilty of antitrust violations, would be subject to possible multiple lawsuits from distributors and from consumers. Each would seek recovery of some unidentifiable portion of the same price increase. The Court cannot merely presume that economics requires the cigarette distributors to increase their prices in lock-step with the tobacco companies.

**2. Response to Petitioner's "*Noerr-Pennington*" argument: The *Noerr-Pennington* doctrine does not require "state action." It does not matter whether the government takes any action or not; what matters is that the Defendants are immunized because they are seeking governmental action or redress, either directly, or through the Courts.**

The "Noerr-Pennington doctrine" arose out of two cases. See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-38 (1961) (establishing immunity for petitions to state legislature); and United Mine Workers of America v. Pennington, 381 U.S. 657, 670 (1965) (extending Noerr immunity to petitions of public officials). The District Court properly noted that the Noerr-Pennington doctrine, "holds generally that a private entity's right to petition the government, including the judiciary, is immune from federal antitrust claims, regardless of any anti-competitive intent or consequences, unless such conduct or action is a 'sham.'" App. 7 The District Court held that the Defendants were privileged to settle its case with the States, because the settlement process was simply part of the Defendants' right to petition the government and was protected under Noerr-Pennington.

Petitioners argue that *Noerr-Pennington* can not apply because the various Attorneys General were acting outside their authority in entering the settlement. This simply is not so, but neither is it relevant. We see nothing in the *Noerr-Pennington* doctrine that requires Respondents to prove that the government agency they were "petitioning" actually had the authority to take the action that it eventually took. It would unduly restrict the doctrine to require the Defendant to defend the "jurisdiction" of the governmental entity that was being petitioned.

The settlement process was equated with the litigation process in *Columbia Pictures Industries, Inc. v Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1528 (9th Cir., 1991), aff'd, 508 U.S. 49, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993).

> On the facts of this case, PRE's request for licensing amounted to an offer to settle the lawsuit. If Columbia Pictures agreed to license PRE, the lawsuit would be moot.
>
> A decision to accept or reject an offer of settlement is conduct incidental to the prosecution of the suit and not a separate and distinct activity which might form the basis for antitrust liability.

This Court affirmed the Ninth Circuit in Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc., 508 U.S. 49, 60-61, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993). It is apparent that a settlement agreement, that arises out of litigation, would be protected under the Noerr-Pennington doctrine, to the same extent that the underlying litigation would.

In short, the Defendants had a First Amendment right to enter into this settlement. Similarly, each State probably has "right to petition" clauses, similar to Oklahoma's (Oklahoma Constitution, Art. 2, §3) which give rights similar to the First Amendment, and from which similar privileges arise. *Gaylord Entertainment Co. v Thompson*, 958 P.2d 128 (Okla. 1998).

The Defendants have more than a "double shot" of such rights in this case, because they are "petitioning" on three levels in the underlying suit. On one level, by defending the underlying lawsuits, they were "petitioning" the various State courts to protect them from the claims of the various States. They had a First Amendment right to do this, and to defend these claims. On another level, when it came time to settle the cases, the tobacco companies' opponents were the various State governments themselves. The cases were being prosecuted by the various States. Therefore, the settlement negotiations, and the resulting settlements, were the result of "petitioning" the various governmental plaintiffs to settle their claims against the tobacco companies. Finally, for a third level, the cases were ultimately settled after the parties sought approval of the settlement agreements, by consent decree, from the various State courts. Plaintiffs' suit seeks redress against these private Defendants because they participated in a <u>successful</u> attempt to procure a court order! Plaintiffs' suit is a collateral attack on that underlying judgment approving the settlement.

The Defendants had an objectively reasonable belief that they had the right to settle, under the agreement set forth in the MSA. Although Plaintiffs make some novel (the District Court

said the Plaintiffs were "without any authority whatsoever", Aplt.App. 495) arguments, they are not exactly arguments that are obvious on the face of the MSA. If the Defendants asked this Court for permission to enter into the MSA, would this Court sanction the Defendants under Fed. R. Civ. Pro., Rule 11? Obviously, this Court would not. It simply was not objectively unreasonable for these Defendants to believe that the MSA was a legally valid settlement agreement, and well within their First Amendment rights to agree to, and to seek court approval of, under the *Noerr-Pennington* doctrine.

**3. Response to the Petitioner's "illegal compact" argument. This argument is totally without merit and is being made for the first time on appeal. Plaintiffs now pursue, on appeal, a constitutional theory that is completely new to the annals of law, as well as completely new to this case.**

**A) This theory can not be pursued on appeal because it was not argued in the trial court.**

Throughout this litigation, the Plaintiffs have complained that the States, and the Defendants, had entered into an unconstitutional "confederation," in violation of Article 1, Sec. 10, cl. 1 of the United States Constitution. App. 18-19. This clause, emphasis added, reads:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal;...

The Plaintiffs have consistently argued that the MSA was invalid because the signatory States were bonding together, into an illegal "confederation," to form an illegal "de facto government"

that purports to regulate tobacco manufacture and sales. This "de facto" government theme is found in their original Complaint, at Aplt.App. pg. 14.

During the Motion to Dismiss/Summary Judgment, the Plaintiffs characterized their constitutional arguments as an attack under Article 1, Sec. 10, cl. 1 of the Constitution. They claimed that "The parties to the MSA have formed an unlawful confederation in violation of U.S. Const. Article 1, §10, cl. 1..." Aplt.App. pg. 419. Further, they darkly warn that, "Once the MSA procedure is accepted and legitimized there may be no end to the intrusion of separate confederations of states formed and administered for the purpose of regulation and taxation of lawful commercial activities within the United States." Aplt.App. pg. 420. Judge Cook, in his April 29, 1999 Order, also thought that the issue was whether the states had entered into an "unlawful confederation" and had formed a "de facto government." App. 502.

Now that we get on appeal, we find that the Constitutional argument has shifted. Now we find out that the MSA was really an "illegal interstate compact prohibited by the United States Constitution Art. 1, §10, Clause 3 which provides: 'No state shall without the consent of Congress ... enter into any agreement or compact with another state...'" Petition 20.

It is a long-settled tenant of law that an appellant can not change theories of recovery on appeal and expect to get a hearing. An appellant will not be allowed to argue, on appeal, an entirely different theory than that presented to the trial court. *Singleton v Wulff*, 428 U.S. 106, 121, 96 S.Ct. 288, 2877, 49 L.Ed.2d 826

(1976)[citing the general rule, and noting that the appellate court is well within its discretion to refuse to listen to such arguments]; *Polin v Dun & Bradstreet, Inc.*, 511 F.2d 875 (10th Cir. 1975) [Plaintiff can not, on appeal, argue for a theory of recovery that was not argued in the trial court.]; *Tele-Communications, Inc. v. C.I.R.*, 104 F.3d 1229, 1233 (10th Cir. 1997). As the Tenth Circuit held in *Tele-Communications, Inc.*:

> This rule is particularly apt when dealing with an appeal from a grant of summary judgment, because the material facts are not in dispute and the trial judge considers only opposing legal theories. Anschutz Land and Livestock Co., Inc. v. Union Pac. R.R. Co., 820 F.2d 338, 344 n. 5 (10th Cir.1987). Propounding new arguments on appeal in an attempt to prompt us to reverse the trial court undermines important judicial values. In order to preserve the integrity of the appellate structure, we should not be considered a "second-shot" forum, a forum where secondary, back-up theories may be mounted for the first time. Id. Parties must be encouraged to "give it everything they've got" at the trial level. Id. Thus, an issue must be " 'presented to, considered [and] decided by the trial court' " before it can be raised on appeal. See Lyons 994 F.2d at 721 (quoting Cavic v. Pioneer Astro. Indus., 825 F.2d 1421, 1425 (10th Cir.1987)) (alteration in original).

The same decision made clear that appellants would not be allowed to make vague references to a theory in the trial court, or leave a

theory "undeveloped," and then pursue that theory on appeal. Id. at 1233.

That is exactly what has happened here. In the trial court, Plaintiffs argued that the States had formed a "confederation," similar to the Civil-War Confederacy [Aplt.App. pg. 480], and were acting as a "de facto government," presuming to levy taxes, and assuming regulation over an industry. Plaintiffs carefully detailed all of the similarities between the "MSA Confederacy" and a true government (constitution, laws, branches, courts, taxes, treasury, regulation). Aplt.App. pg. 419. They argued that this constituted an "illegitimate government." Aplt.App. pg. 420. Such are the arguments that become necessary when trying to prove an actual "confederacy" under Art. 1, §10, cl. 1.

This is a far cry from the "compact clause" argument taken from Art. 1, §10, cl. 3. The Plaintiff shifts from trying to prove an illegal shadow government and begins arguing merely that the States entered into an illegal contract (compact). An interstate compact is merely a contract between the states. *Texas v New Mexico*, 482 U.S. 124, 107 S.Ct. 2279, 96 L.Ed2d 105, opn. after remand, 485 U.S. 388, 108 S.Ct. 1201, 99 L.Ed.2d 450 (1987). There has been only one "confederacy" in our history, and that confederacy brought us war. However, our governmental history is replete with interstate "compacts," and none of those compacts have brought us to civil war yet. The point being, of course, that there is a vast difference between arguing that state action constitutes a "confederacy" under clause 1, and arguing that it is a "compact" under clause 3. Plaintiffs simply cannot make this argument on appeal, as it was not argued in the trial court.

**B) The MSA does not violate the "compacts" clause.**

The various States filed the subject lawsuits as an attempt to recover healthcare costs that they had provided to their citizens and that they claimed related to smoking cigarettes. This is an act that the States would argue that they had a right to do under their parens patriae power.

> In fact, it has long been recognized that, under the parens patriae power, a state may initiate a lawsuit seeking injunctive or monetary relief where the claims are based on an alleged wrong to the general welfare of its citizenry. See, e.g., Stead v. Fortner, 255 Ill. 468, 478, 99 N.E. 680, 683-684 (1912) ("The public authorities have a right to institute the suit where the general public welfare demands it and damages to the public are not susceptible of computation. The maintenance of the public health, morals, safety, and welfare is on a plane above mere pecuniary damage, although not susceptible to measurement in money, and to say that a court of equity may not enjoin a public nuisance because property rights are not involved would be to say that the state is unable to enforce the law or protect its citizens from public wrongs."); State v. F.W. Fitch Co., 236 Iowa 208, 214, 17 N.W.2d 380, 383 (1945) ("It is a general rule that, independently of any statutory provision, a state may institute a suit in any of its own courts, whether required by its pecuniary interests or the general public welfare."); State v. Ri-Mel, Inc., 417 N.W.2d 102, 112 (Minn.Ct.App.1987) ("[C]ommon law has recognized that

under the doctrine of parens patriae a state may maintain a legal action on behalf of its citizens, where state citizens have been harmed and the state maintains a quasi-sovereign interest."); State v. Kansas City Firefighters Local No. 42, 672 S.W.2d 99, 126 (Mo.Ct.App.1984) ("The right of a state, either as the sovereign or as a political corporation, to sue in any of its courts exists independent of statute... To enforce a right or redress a wrong as a political corporation, the state may have avail of any remedy open to a private suitor - as for instance a tort action for damage to its property."); State v. Chicago & N.W. Ry. Co., 147 Neb. 970, 977, 25 N.W.2d 824, 828 (1947) ("It is a general rule that every government entrusted with powers and duties involving the public welfare has a right to apply to its own courts for any proper assistance in the exercise of one and discharge of another."); People v. Gary M., 138 Misc.2d 1081, 1092, 526 N.Y.S.2d 986, 995 (1988) ("[T]he doctrine of parens patriae imposes an obligation on the part of the State to protect the rights of its citizens."); State v. Hooker, 87 N.W.2d 337, 340 (N.D.1957) ("It has been repeatedly held that the state has the right, independent of any statutory provision, to institute a suit in any of its courts when it is required for the general welfare of its people."); State v. City of Bowling Green, 38 Ohio St.2d 281, 283, 313 N.E.2d 409, 411 (1974) ("[W]here the state is deemed to be the trustee of property for the benefit of the public it has the obligation to bring suit not only to protect the corpus of the trust property but also to recoup the public's loss

occasioned by the negligent acts of those who damage such property.")

*Commonwealth v Phillip Morris, Inc.*, 736 A.2d 693, 701 (Pa.Cmwlth. 1999), dissenting opinion.

Presuming that the States each had a right to bring their individual actions against the tobacco companies, it then stands to reason that the States also had the right and power to bring those actions to a conclusion. Acting under their parens patriae power, each individual State had the right and power to negotiate and receive a settlement with the underlying tobacco defendants. Otherwise, how would the States ever "recoup the public's loss occasioned by the negligent acts of those who damage" the public treasury?

Certainly, no matter what the merits of the actions, the States would argue that they had the right to bring their individual actions against the tobacco companies. Further, the States had the right to settle their individual claims against the tobacco defendants. There is no doubt that they could do so, individually, under this settlement agreement, without offending Art. 1, §10, cl. 3, because, with no other States being involved in the agreement, there is no way it could offend the "compact" clause.

Therefore, Plaintiff's only possible complaint is that the Defendants settled with several States, under <u>combined</u> settlement documents. Plaintiff's only way to win under its Art. 1, §10, cl. 3 arguments is to somehow show that this group of States could not do, under one document, what they obviously could do under several separate documents.

This points out the primary weakness in Plaintiff's "compact" arguments: the agreement in question is not so much between the various States as it is between each State and the tobacco companies. Substantially the same agreement could have been worked out by each of the separate States. The fact that they all happen to be grouped into the same settlement document is of little moment. Plaintiffs show us no authority that such a group of individual settlement contracts, clustered under one umbrella, is illegal.

Further, the Plaintiff ignores the fact that the MSA was confirmed by a "Consent Decree and Judgment" entered into by each of the respective state courts. For example, the Oklahoma litigation was settled, not by the MSA, but by the Consent Decree and Final Judgment, Aplt.App. pg. 60. In other words, the Plaintiffs are not seeking to hold an "agreement" invalid, but are attacking the very validity of a whole series of state court decrees. In effect, Plaintiffs are attempting to make a collateral attack on approximately 40 state court judgments, and doing so by only suing one of the two sides of these multiple lawsuits.

Plaintiffs have presented no authority that the Judgments, entered by the individual various state courts, would qualify as a single "compact" between the various states. The MSA was not binding unless, and until, it was approved by the various state courts involved. The enforcement of the consent decree is by seeking an "Enforcement Order," and ultimately "an order for interpretation or for monetary, civil contempt or criminal sanctions to enforce compliance with such Enforcement Order." Obviously, this is more than a mere "contract" (compact). Rather, the MSA

rises to the dignity of a court order, which can be enforced by contempt and criminal sanctions. Plaintiffs present no authority that such a court order can be construed as a mere "compact."

In short, the Plaintiffs' "compact" theory is undeveloped (probably because it appears to be an afterthought and was not truly litigated in the district court) and supported by absolutely no authority.

**4. There was no "rush to judgment" here. Plaintiff was aware of the factual assertions that Defendants had made; Plaintiff had the same opportunity to present counter-factual assertions as the Defendants did. In any event, the factual assertions presented by the Defendants (unopposed by Plaintiffs) were based almost exclusively on the settlement agreement itself, which was attached to the Motion.**

Plaintiffs complain that they were not "on notice that she had to come forward with all of her evidence" after the Trial Court "converted" the Motion to Dismiss into a Motion for Summary Judgment. Petition, pg. 25. That is puzzling, since the Trial Court issued a specific and pointed Order giving notice of the "conversion," and allowing Defendants to submit additional evidence, and giving Plaintiffs "fifteen days to respond thereto." App. 27. Instead of using the opportunity to submit any additional facts that Plaintiffs felt were relevant, Plaintiff simply complained about the "format" of the Defendant's submission (they complained that Defendant's facts were not numbered).

This Court has said that a Trial Court can "enter summary judgment sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp.*

*v Catrett*, 477 U.S. 317, 326 (1986). The Tenth Circuit has adopted a reasonable and protective set of procedural requirements for giving such notice, and protecting the rights of the non-moving party.

A Motion to Dismiss can be "treated as" a Motion for Summary Judgment under Rule 12(b). Rule 12(b) says:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

In *Brown v Zavaras*, 63 F.3d 967 (10th Cir. 1995), the Court held that, after a Motion to Dismiss is converted to a Motion for Summary Judgment, the trial court should (a) give notice of the changed status, and (b) provide the parties the opportunity to present to the court all material made pertinent to such motion by Rule 56. Nothing in Brown, nothing in Rule 12(b), and nothing in Rule 56, requires that the movants actually restructure and refile their original Motion to separately number "undisputed facts."

Rule 12(b) does not say so, nor does Rule 56, or *Brown*, but Plaintiff would apparently also require us to abandon our original Motion and Brief, and to refile it all, re-couched in the format of a Motion for Summary Judgment. Further, Plaintiff would have us take that format, not from Rule 56 (which says

nothing of numbering facts), but from Local Rule 56.1A. Much could be said as to whether this is "preferable." But Plaintiffs must admit that such a procedure would go beyond the strict terms of Rule 12(b), Rule 56, or *Brown*. It certainly exceeds the pure "notice" requirement set forth in *Catrett*.

Rather, the plain requirements are much simpler. If the movant so wishes, the movant is allowed to supplement its Motion to Dismiss with citations to facts outside the four corners of the pleadings. The party responding to the motion has the same opportunity.

Plaintiff complains that, because we failed to separately list and number a long series of facts, that they missed the opportunity to comply with Local Rule 56.1B (requiring the response brief on Summary Judgment to separately list facts in dispute). Aplt. Brief, pg. 10. Local Rule 56.1B says:

> The response brief to a motion for summary judgment (or partial summary judgment) shall begin with a section which contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party.

A review of Plaintiff's "Supplemental Submission" (beginning at Aplt.App. 474) shows that Plaintiff chose not to take the opportunity to make a "concise statement of material facts" that are in dispute. The Local Rule only requires Plaintiff to refer to Defendant's "numbers" when such is "applicable." Of course, in the case at bar, since the Defendant had not listed such numbers, then the Plaintiff would not have been required to respond in that fashion. However, whether the facts were separately numbered or not, the Plaintiff still had the opportunity to make its own list of disputed facts. The "portions of the record upon which the [Defendant] relies" was self-evident (see the "Facts" section of the Motion to Dismiss, at Aplt.App. 36-37, and accompanying documents). If Plaintiff disputed the authenticity of any of these facts or documents, Plaintiff was well able to say so in Plaintiff's Supplemental Submission, and to produce documents or affidavits to dispute the Defendants' facts. Plaintiffs chose not to introduce any further information.

We do not believe that Local Rule 56.1 was violated. However, since Local Rule 56.1 contains requirements that go above and beyond the requirements of Rule 56, it would seem well within a Trial Court's discretion to dispense with these requirements if it so chose. *Silberstein v I.R.S.*, 16 F.3d 858 (8th Cir. 1994) [district court has considerable leeway in application of its local rules.] A District Court is not "bound" by it's local summary judgment rules. *Guerrero v American-Hawaiian Steamship Co.*, 222 F.2d 238, 245 (9th Cir. 1955). In fact, requirements in local rules that contravene, or place more stringent requirements than, the Federal Rules of Civil Procedure are invalid under Fed.R.Civ.Pro. Rule 83.

Plaintiffs have not pointed to one "disputed fact" that they were supposedly prevented from asserting in the Trial Court as a result of the procedure used. They may have failed to present disputed facts, but it was not because they did not have the chance. They were given the same chance that Defendants had to present to the Court all pertinent materials that may have shown a disputed fact. This is all that is required under *Catrett*, under the Rule, and under *Brown*. The Trial Court's procedure was fair and the case should not be reversed on these grounds.

Plaintiffs also charges the lower court of "railroading," and set up three "issues." Plaintiffs say that these issues need to be "addressed," (Petition, pg. 26) but they then leave us with no real framework to do so. However, we will attempt to do so anyway.

1. *May the lower court favor one party over another in the application of procedural rules?* As an abstract question, it sounds like the answer should be "no." However, in the setting of this case, this question does not help the Plaintiffs. Both parties were told what the rules were: this Motion to Dismiss is now a Motion for Summary Judgment; if there are additional factual issues that you wish to present to the court, do so within the time specified. The same "rule" was applied to both sides. There is no indication that one side was favored over another.

2. *May the lower court rely upon undocumented self-serving declarations and conclusions, rather than 'ultimate facts', in support of summary judgment?* Plaintiffs do not bother to tell us what "self-serving" facts the Court relied upon. Neither do they tell us what "ultimate facts" the Court should have relied upon. Nor do they define the phrase "ultimate fact." If there were certain

"ultimate facts" that the Plaintiffs wanted the Trial Court to rely upon, Plaintiffs had a chance to point them out.

3. *Must a party, in response to a motion for summary judgment, address all possible permutations which might be derived from the adverse parties argument or exhibits prepared in contemplation of litigation, or must a party address only 'ultimate facts' supported by reliable evidence in the form of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits.' [Fed.R.Civ.P. 56(c)]?* Again, if the Trial Court was guilty of concentrating on unsupported "permutations," no particular "permutations" are specified by the Plaintiffs, so we do not know how to respond to this assertion.

Plaintiffs' "rush to judgment" argument makes vague references to a general failure to allow discovery. Yet, the parties stipulated that discovery would be stayed until after the Motions were ruled on. Petition, pg. 23. Further, Plaintiffs knew that, if justice required further discovery prior to a ruling on the Motions, the Plaintiffs were within their rights to request that the ruling be stayed pending further discovery. Fed.R.Civ.P. 56(f). The Court made the provisions of Rule 56 available to the Plaintiffs, but Plaintiffs failed to make any Rule 56(f) motion. This case was pending in the Trial Court for five full months. The "rush to judgment" argument should fail.

**CONCLUSION.**

This is a novel case. But it is novel only because it is making assertions that are supported nowhere in our substantive or procedural law. Plaintiffs/Petitioners have been given every

opportunity to state a valid claim and have only been able to skip from one unsupportable ramble to another. This Court should refuse Certiorari.

Respectfully submitted,

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